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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1511

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Petitioner

v.

EVELYN ELLIOTT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The Respondents adopt the summary of the Opinions Below which appears in the Brief for the Petitioner.

JURISDICTION

The Respondents adopt the statement of Jurisdiction which appears in the Brief for the Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be . . . deprived of . . . property, without due process of law . . .

2. Sections 204(a) and (b) of the Social Security Act, 42 U.S.C. 404(a) and (b) set forth the prerequisites for recoupment of past overpayments from present benefits. § 204(a) states in relevant part:

> (a) Whenever the Secretary finds that more or less than the correct amount of payments has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> (1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the payments to such overpaid person, or shall apply any combination of the foregoing . . .;

while § 204(b) requires that:

> (b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

The applicable regulations and procedures of the Department of Health, Education and Welfare are set forth in pertinent part at Appendices A and B herein.

QUESTIONS PRESENTED

1. Whether either § 204(b) of the Social Security Act or the due process clause of the fifth amendment requires that recipients of social security benefits be provided an opportunity for an oral evidentiary hearing on the issue of waiver before rather than after their monthly benefits are reduced or suspended in order to recoup an overpayment.

2. Whether the district courts had jurisdiction under either 28 US.C. § 1361 or 42 U.S.C. § 205(g) to issue classwide injunctive relief to Social Security recipients whose claims for waiver of recoupment are decided by the Secretary without providing an opportunity for an oral pre-recoupment hearing.

STATEMENT OF THE CASE

These consolidated cases were brought by respondents, all of whom are recipients of benefits under Title II of the Social Security Act of 1935, challenging the procedures used by the Social Security Administra-

tion (hereinafter the "Secretary") to recoup[1] overpayments. Respondents' challenges were based on the grounds that these procedures violate § 204(b) of the Social Security Act and the due process clause of the fifth amendment insofar as they do not provide an opportunity for a pre-recoupment oral hearing to determine whether recoupment of the overpayments should be waived.

It is important to note at the outset that this case is significantly different from the one which was before the court of appeals in two important respects. On the one hand, in his Opening Brief (hereinafter cited as Op. Br.) the Secretary reveals new recoupment procedures, effective January, 1979, which he claims materially alter the balancing of the respective interests in this case for purposes of determining whether a pre-recoupment oral hearing is constitutionally required. This action by the Secretary to change the Claims Manual procedure regarding recoupment is consistent with his revisions of the Claims Manual throughout this litigation in an effort to meet the concerns of the district and appellate courts in this case. Despite these changes, the Secretary still does not provide the necessary opportunity for a pre-recoupment oral hearing although he now claims that his most recent changes to his recoupment procedures are important. While an evaluation of these new procedures shows that the Secretary is still not providing an opportunity for a pre-recoupment oral hearing as required by the lower courts and also

[1] The term "recoup" means to suspend or reduce current benefits to secure repayment of the alleged past overpayment. The period of the suspension and the amount of reduction are unilaterally determined by the Secretary.

shows that the Secretary's claims about these new procedures are substantially exaggerated, it is essential for this Court to recognize that these new procedures have never been reviewed by any of the lower courts. If these new procedures do change significantly the recoupment system, then undoubtedly the proper forum for the Secretary to litigate that issue is in the respective district courts, not *de novo* in this Court. If these procedures do not alter substantially the recoupment procedures found to be illegal by all the lower courts, then it is improper for the Secretary to suggest to this Court that the changes are material and this Court should ignore these changes. For these reasons, respondents have filed a motion to dismiss or remand with this Court to allow the district court to determine the impact, if any, of these procedures.

On the other hand, the Secretary has abandoned his contention that his notice procedures and notice forms, which are an integral part of the recoupment process for every social security recipient, are valid. Understandably, the Secretary did not seek review by this Court of the court of appeals' ruling that his notice procedures and forms did not meet even the minimal requirements of proper notice under the due process clause of the fifth amendment. Therefore, that issue is not before this Court.[2]

[2] Repeatedly in his brief the Secretary attempts to enhance his argument that his recoupment procedures are constitutionally acceptable by describing the challenged scheme and making factual representations about respondents to demonstrate the fundamental fairness and efficiency of these recoupment procedures. However, the Secretary's factual representations must be carefully scrutinized since he failed to adequately inform respondents of their rights. Consequently, this Court should rely solely on

At the heart of the controversy before this Court is the correctness of the court of appeals' decision which requires the Secretary, consistent with § 204(b) of the Social Security Act and the fifth amendment to the United States Constitution, to provide an opportunity for a pre-recoupment hearing to recipients who seek to assert their statutory right to waiver of the overpayment. In 1939, Congress enacted § 204(b) of the Social Security Act, 42 U.S.C. § 402(b). It requires that:

> In any case in which more than the correct amount of payments has been made, *there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.* (Emphasis added.)

Consistent with this statutory mandate, the Secretary has promulgated detailed regulations which define the key statutory terms such as "without fault, "against equity and good conscience, and what is "contrary to purposes of Title II." Congress expressly prohibited the Secretary from recouping overpayment from recipients unless he determined their eligibility for waiver. As reflected in the Secretary's regulations, § 204(b) requires an in-depth, highly-individualized assessment of a recipient's state of mind and financial situation *prior to* the reduction or suspension of the recipients benefits in order to recoup any overpayment.

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the factual findings of the lower courts and not on the Secretary's representations about either the individual respondents or the recoupment procedures.

Under the Secretary's challenged recoupment procedures he makes an initial, *ex parte* determination that the recipient was overpaid. The recipient is then generally given a vague notice of his/her right to challenge the existence of the overpayment (*i.e.*, to request reconsideration) or ask that that debt be forgiven (*i.e.*, to seek waiver under § 204(b)). However, the initial recoupment letters sent by the Secretary to the recipients make no specific mention of the recipients' rights to reconsideration or waiver, nor do they set forth meaningful information about how to contest the overpayment. 564 F.2d 1219, 1235-36. The recipient obtains review of his/her case only by sending a letter or completing the appropriate form stating his/her reasons for opposing the overpayment determination or seeking waiver.[3]

It is the Secretary's stated policy to postpone temporarily recoupment action upon receipt of a request for reconsideration and/or waiver. Nevertheless, in many instances the recoupment action is not halted by the Secretary's receipt of a request for reconsideration or waiver. *See e.g.*, *Elliott* v. *Weinberger*, 371 F. Supp. 960, 966 n. 14 (D. Haw. 1974). In any event,

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[3] Contrary to the Secretary's claims that his employees assist recipients in seeking waiver and that recipients would be assisted in completing the appropriate forms to halt the proposed recoupment (Op. Br. at 4-5), the court of appeals specifically found that although all the named respondents had timely contacted the local social security office their next check, if recieved at all, was received in the reduced amount. Moreover, the court affirmed the *Elliott* district court's finding of fact that the "appropriate" forms required by the Secretary for the recoupment to assert his/her right to reconsideration and/or waiver were not readily available. *Elliott*, 564 F.2d at 1224, affirming 371 F.Supp. 960, 966, n. 14.

deferral of recoupment beyond 30 days after the date of the initial notice lies entirely within the discretion of the Secretary. *See* Claims Manual Section 5503.

Additionally, the only review available to the recipient who requests waiver, which requires an in-depth factual evaluation of fault, need, and detrimental reliance, is the Secretary's review of the information contained in the reconsideration and/or waiver forms or in any letter or other written document which is submitted to him by the recipient. Solely on the basis of that information, and without any effort to assess the recipient's credibility, the Secretary reviews the initial overpayment determination and determines whether the recipient is at fault and whether the recoupment would cause a financial hardship *i.e.*, whether waiver is appropriate. This review is not conducted by the recipient's local social security office; rather it is entirely in the control and discretion of one of the seven (7) regional Social Security Program Centers. The recipient is then notified of the decision and, if adverse, the Secretary immediately resumes the withholding of benefits to satisfy the overpayment. If the recipient is dissatisfied with this decision he/she may then request a *de novo* administrative hearing at which the recipient is provided his/her first opportunity to present oral testimony and to cross-examine witnesses before an independent hearing examiner. Recoupment, however, is not suspended pending the outcome of this *de novo* hearing and that hearing usually does not occur until many months after the initial waiver request.[4]

[4] In addition to this belated *de novo* hearing, should the hearings examiner affirm the Secretary's determination, the recipient can appeal to the Appeals Council of the Social Security Administration and eventually, if necessary, for judicial review of the Appeals Council's decision to district court.

To summarize, the Secretary's recoupment procedures found to be illegal by all the courts below are as follows:

(1) The Secretary makes an *ex parte* overpayment decision and so informs the recipient; however, he makes no initial decision regarding waiver of that overpayment;

(2) the recipient has 30 days in which to request review of that decision. This reconsideration could include both a redetermination of whether there was an overpayment and a decision as to whether recovery should be waived pursuant to § 204(b);

(3) during this short 30-day tolling period, the recipient may submit only written information which either contests the overpayment determination or supports a request for waiver of recoupment of the overpayment. This information is gathered by a local office of the Social Security Administration and is then forwarded to one of the seven (7) regional program centers where the *ex parte* waiver decision is made;

(4) reduction or suspension of the recipient's social security benefits should be tolled (but for all the named respondents recoupment was not tolled) during this initial reconsideration/waiver process; and

(5) solely on this paper review, the Secretary initially decides the waiver question.

All the respondents in this case are recipients of either old age, disability, or survivor's benefits under

Title II of the Social Security Act. All of them received the form notices from the Secretary announcing his *ex parte* determination of an overpayment. All of them timely contacted the local Social Security office, *i.e.*, within 30 days from receipt of the notice of overpayment, for the purposes of both contesting these overpayment decisions and, more importantly, to assert their statutory rights to waiver. In all cases, respondents' efforts to contest the overpayment and seek waiver were insufficient to halt the recoupment action proposed by the Secretary, despite the Secretary's oft-repeated assurances that requests for review halt recoupment. *Elliott*, 564 F.2d at 1228.

The three courts below ruled that the Secretary's recoupment procedures violate the due process clause of the fifth amendment of the United States Constitution insofar as they fail to provide pre-recoupment oral hearings on the creditability-based, highly individualized factual issues involved in the waiver determination. The court of appeals ordered the Secretary to provide the opportunity for such pre-recoupment oral hearings to the limited group of recipients like respondents, that Congress intended to protect by enacting the waiver provisions of Section 204(b) of the Social Security Act.[5]

SUMMARY OF ARGUMENT

The court of appeals properly balanced the competing governmental and private interests at stake, in

[5] Indeed, this conclusion was the one reached by the Court of Appeals for the Third Circuit in *Mattern* v. *Califano*, 582 F.2d 248 (3d Cir. 1978) petition for certiorari pending *sub nom Califano* v. *Mattern*, No. 78-699.

light of the mandatory waiver provision of § 204(b), and concluded that the due process clause required the Secretary to provide an opportunity for a pre-recoupment oral, evidentiary hearing regarding the recipient's eligibility for waiver of an overpayment. This conclusion is unavoidable for several reasons. First, it is required by the clear wording of Section 204(b), its legislative history and this Court's decision in *California Department of Human Resources* v. *Java*, 402 U.S. 121 (1970). Secondly, it is clear that the authoritative teachings of this Court, beginning with the decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and culminating in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), dictate that an opportunity for a pre-recoupment oral hearing is necessary. Despite the highly individualized, subjective nature of the waiver inquiry, the Secretary's challenged procedures utterly fail to address either the problems inherent in making the difficult factual inquiries in the waiver decision of the difficulties resulting from the varying abilities of the elderly and often infirm recipients to address such issues through *ex parte* written submissions. Moreover, there are substantial administrative gains, in terms of the accuracy of the waiver determination process, in providing pre-recoupment oral hearings which greatly outweigh the insignificant costs the Secretary estimates. Finally, such pre-recoupment oral hearings are appropriate in light of the numerous similarities, in terms of the private interests at stake, between these social security recipients and the welfare recipients in *Goldberg* v. *Kelly, supra*.

Regarding the jurisdictional issues, the district courts properly exercised subject matter jurisdiction in these cases because 28 U.S.C. § 1361 authorizes federal courts to halt illegal conduct by federal offi-

cials where those officials owe a duty, either by operation of the constitution or statute, to the plaintiffs. Since respondents alleged that the Secretary's conduct in failing to provide them with the opportunity for a pre-recoupment oral hearing violated the fifth amendment and Section 204 of the Social Security Act, they met all necessary requirements for mandamus jurisdiction under § 1361. Moreover, it is clear that the district courts could grant full relief to the respondents and their class under § 205(g) of the Social Security Act. The Secretary's position that § 205(g) of the Social Security Act prohibits 1361 jurisdiction if accepted, would serve to bar as an unwarranted bar to social security recipients seeking judicial review of unconstitutional and illegal practices of the Social Security Administration. In effect the Secretary ignores § 1361 and seeks to insulate himself from meaningful judicial scrutiny. Equally unpersuasive is the Secretary's claim that class-wide relief is inappropriate under § 205(g). Therefore, it was proper for the district courts to exercise jurisdiction under § 205(g) and to grant injunctive relief to the class.

I.

UNDER EITHER § 204(b) OR THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT THE SECRETARY IS REQUIRED TO PROVIDE THE OPPORTUNITY FOR PRE-RECOUPMENT ORAL HEARINGS

A. Section 204(b) Itself Requires A Pre-recoupment Oral Hearing For All Waiver Cases

While the court of appeals based its decision on the due process clause, it is evident that § 204(b), by its own terms, requires an opportunity for a pre-recoupment oral hearing. This Court has repeatedly stated that if an interpretation of a statute would avoid the need to resolve a constitutional challenge, then it is the reviewing court's duty to scrutinize closely the statutory claim and attempt to reach an interpretation of it that would avoid the constitutional issue. *Fusari* v. *Steinberg*, 419 U.S. 379, 388, n. 13 (1975); *See e.g. California Department of Human Resources* v. *Java*, 402 U.S. 121, 124 (1971); *Dandridge* v. *Williams*, 397, U.S. 471, 475-476 (1970); *Rosado* v. *Wyman*, 397 U.S. 397, 402 (1970). The most pertinent example of the importance this Court places on this tenet of constitutional construction is its disposition of *California Department of Human Resource* v. *Java*, *supra*. In *Java*, plaintiffs challenged the procedures employed by California state officials under the California Unemployment Compensation Program which required an automatic suspension of benefits to an unemployed worker, who had been previously determined eligible, upon the employer's appeal of that eligibility determination. Payment of the worker's unemployment benefits would resume only if he prevailed at a second hearing. If he prevailed he would be paid retroactive compensation for any benefits lost. Plaintiffs argued that this automatic suspension provision violated both the due process clause of the fourteenth amendment to the United States Constitution and the "when due" language of § 303(a)(1) of the Social Security Act.[6] The district court ruled that

[6] Section 303(a)(1) of the Social Security Act, 42 USC § 503(a)(1), provides in part:

> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such

California's automatic suspension procedure violated this Court's interpretation of the fourteenth amendment in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and that it also contravened § 303(a)(1). On appeal, this Court unanimously affirmed the district court's judgment and stated that

> We agree with the conclusion of the District Court that § 1355 of the California Unemployment Insurance does conflict with the requirements of § 303(a)(1) of the Social Security Act. This holding makes it unnecessary to reach the constitutional issue involved in *Goldberg* v. *Kelly, supra*, on which the District Court relied.

402 U.S. 121, 124. This ruling was reached after this Court thoroughly analyzed the applicable provision of the Social Security Act including a complete review of Congress' intent in enacting § 303. From this analysis and review, this Court determined that

> . . .the word "due" in § 303(a)(1), when read in light of the purposes of the Act means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present

State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for—

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.

> their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment. Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes.

402 U.S. 121, 133.

Like *Java*, in the case at bar respondents' challenge to the validity of the Secretary's recoupment procedures can be resolved without the necessity of reaching the constitutional issue. By the plain language of § 204(b) Congress has unequivocally vested in social security recipients the right to a pre-recoupment waiver decision in which the Secretary must show that the recipient was at fault in receiving or retaining the overpayment or that recovery of the overpayment would not otherwise be contrary to the remedial purposes of the Social Security Act. The exact language used by Congress in § 204(b) is extremely important and is, inexplicably, ignored completely by the Secretary in his brief. That section provides that "*there shall be no* adjustment . . . or recovery by the United States . . ." (Emphasis added.) *Congress* has determined that social security recipients are vested with their right to uninterrupted receipt of their monthly benefits until *after* the requisite factual findings regarding waiver are made by the Secretary. Thus, there can be no question that Congress mandated ("there *shall* be no . . .") that social security recipients were entitled, as a statutory right, to a pre-recoupment

waiver decision. By placing the initial burden on the Secretary to determine waiver *prior to* recoupment, Congress determined that the Secretary was to engage in a very exacting inquiry in order to establish whether the recipient was at fault or whether recoupment would cause a financial hardship and be contrary to the purpose of Title II.[7]

[7] The limited legislative history of § 204(b) is entirely consistent with the foregoing interpretation of the entitlement which Congress intended to vest in social security recipients who are overpaid. Originally enacted in 1939, § 204(b) was intended to be a complete waiver by the United States of any right to recover overpaid monies from social security recipients who were not "at fault" in causing or retaining the overpayment or who could repay the overpayment. *See Hearings Relative to the Social Security Act Amendments of 1939 before the House Committee on Wage and Means*, 76th Cong., 1st Sess. (1939); H.R. Doc. No. 110, 76th Cong., 1st Sess. (1939). In its deliberations regarding the proposed § 204(b), Congress expressed its concern that it be clear to the Secretary that he should assess individually the fault and hardship of each recipient. *See Hearings on H.R. 6635 before the House Committee on Ways and Means*, 76th Cong., 1st Sess. 2287-2289 (1939). Subsequent to its enactment in 1939, § 204(b) has been specifically reviewed by Congress when it was considering amending those sections of the Social Security Act which govern overpayments and underpayments. This review occurred in 1968 *after* the Secretary's administration of § 204(b) had been evaluated by the Comptroller General and that evaluation was submitted to Congress as *The Report to the Congress of the United States, Review of Certain Aspects of Social Security Benefit Overpayments* (March 1967). Even in the face of the Comptroller's report which estimated that for fiscal year 1965 waivers under § 204(b) cost the Secretary over $14,000,000, Congress, in considering amendments to § 204(b), did not enact any legislation which undermined the mandatory language of § 204(b) passed in 1939.

In the face of the clear statutory language and mandate of § 204(b), the Secretary wrongly contends that his present, written submissions procedure is consistent with § 204(b). However, not only does this position ignore the clear command of § 204(b), it also overlooks his own regulations. In order for him to determine "fault" he must evaluate "all pertinent circumstances, including his age, intelligence, education, physical and mental condition." 20 C.F.R. § 404.507.[8]

[8] These critical sections of the Secretary's regulations on "fault" and "hardship" provide as follows:

§ 404.507 Fault.

'Fault' as used in 'without fault' (*See* §§ 404.506 and 405.355) applied only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault (except for 'deduction overpayments'—*See* § 404.510) on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under Section 1814() of the Act resulted from:

(a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or

(b) Failure to furnish information which he knew or should have known to be material; or

(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been

Moreover, 20 C.F.R. §§ 404.510-511 require him to evaluate the state of mind of the social security recipient to determine whether there has been reasonable belief, unjustified reliance, unawareness, lack of knowledge or failure to understand applicable law. Finally, 20 C.F.R. § 404.511 requires the Secretary to determine whether the recipient acted in good faith and used a high degree of care in order to decide the fault prerequisite of § 204(b). The Secretary's practice of recouping overpayments without first affording a recipient an opportunity for an oral hearing at which these highly individualized issues of fact can be decided surely cannot be justified in light of the clear prohibition against summary recoupment found in § 204(b).

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expected to know was incorrect. [34 F.R. 14888, Sept. 27, 1969; 34 F.R. 15646, Oct. 9, 1969]

§ 404.508 Defeat the purpose of Title II.

(a) General. 'Defeat the purpose of Title II,' for purposes of this subpart, means defeat the purpose of benefits under this Title, *i.e.*, to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (*e.g.*, life, accident, and health insurance including permiums for supplementary medical insurance benefits under Title XVIII), taxes, installment payments, etc.;

(2) Medical, hospitalization, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Other miscellaneous expenses which may reasonable be considered as part of the individual's standard of living.

In light of § 204(b) and its implementing regulations and their analytical similarity to those reviewed in *Java*, this Court's disposition of *Java* is particularly compelling in this case. Like the plaintiffs in *Jave*, respondents will be provided with a full opportunity to present oral evidence on their statutory eligibility only *after* rather than *before* their benefits have been suspended or substantially reduced. Also, the eligibility determination in *Java* and the one in this case are strikingly similar—both are extremely individualized, highly fact-intensive inquiries, *i.e.*, whether, *inter alia*, the unemployed worker and left his last job with "good cause", and whether, *inter alia*, the social security recipient is "at fault" in causing or retaining the overpayment. Both in *Jave* and the instant case, program beneficiaries are entitled to an opportunity for an oral hearing to establish their respective statutory eligibilities *before* the administrative agency acts to terminate or suspend their benefits. Additionally, because of the mandatory nature of § 303 (as

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(b) *When adjustment or recovery will defeat the purpose of Title II.* Adjustment or recovery will defeat the purposes of Title II in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses. [32 F.R. 18026, Dec. 16, 1967, as amended at 34 F.R. 14888, Sept. 27, 1969]

'Against equity and good conscience' means that adjustment or recovery of an incorrect payment (under Title II or Title XVIII) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1) and (4) or changed his position for the worse (examples (2) and (3)). In reaching such a determination, the individual's financial circumstances are irrelevant.

interpreted by this Court in *Java*) and § 204(b), the initial burden is on the administrative agency to present by reliable and credible evidence reasons why the worker's or recipient's benefits should be terminated or suspended. Finally, like § 303(a)(1) interpreted in *Java*, § 204(b) is an integral part of the Social Security Act with its attendant remedial purposes.

As the court of appeals properly recognized, the facts of Respondent Biner's case graphically illustrate that the Secretary's regulations cannot be administrated without a pre-recoupment oral hearing. While the Secretary can determine that Mrs. Biner may have been overpaid in 1972, it is impossible for him to gauge Mrs. Biner's state of mind and credibility without an opportunity for an oral pre-recoupment hearing. Without affording Mrs. Biner the opportunity for such a hearing, the Secretary decided that Mrs. Biner was "at fault" and therefore not entitled to waiver. However, as the court observed, whether Mrs. Biner knew or should have known or could have known she was not entitled to those checks seems to be a matter incapable of resolution without a hearing to hear her side of the story. Finding fault on the basis of the content of an ambiguous form letter enclosed with the first overpayment check, without giving Mrs. Biner an opportunity to explain in person what she thought it meant, flies in the face of the statutory waiver requirement of § 204(b). 564 F.2d at 1233.[9]

[9] The fact that Ms. Biner was ultimately found at fault has no bearing on whether she was entitled to a prior oral hearing, for as the court of appeals noted:

> The decisionmaker has to hear the claimant's story and perception of the facts in order to determine whether he "should have known." To say that the decisionmaker need not hold a hearing, just because in some cases claimants will fail to meet their burden after testimony, is absurd. *Elliott*, 564 F.2d at 1233, n. 19.

In light of the unequivocal mandate of § 204(b), it is clear that the only fair means for the Secretary to assess and evaluate the recipient's eligibility for waiver is for him to provide the opportunity for pre-recoupment oral hearings on this narrow, yet crucial, issue. By failing to do so and implementing a system of *ex parte*, written submissions, the Secretary has disregarded the specific congressional requirements of § 204(b).

B. The Due Process Clause Of The Fifth Amendment Requires The Secretary To Provide The Opportunity For Pre-recoupment Oral Hearings

The court of appeals, after thoroughly examining the Secretary's recoupment procedures, concluded that those procedures were unreliable, unfair, and unconstitutional. In so deciding, the court of appeals was careful to limit its ruling to only those social security recipients that Congress clearly intended to protect by enacting § 204 of the Social Security Act.[10]

[10] The court of appeals ruled that for a very few recipients who merely contest the Secretary's decision that there has been an overpayment and who raise credibility issues, due process requires the Secretary to provide them with an opportunity for a pre-recoupment oral hearing. The Secretary does not raise this decision as a question for review by this court. While he does address this ruling by claiming that it somehow compels him to provide pre-recoupment hearings to *all* recipients seeking only reconsideration, that contention is surely incorrect. It is clearly the Secretary's choice to expand the scope of the court's ruling. In any event, that portion of the court of appeals decision concerning the reconsideration cases is not before this Court.

Contrary to the Secretary's assertion, the court of appeals did not misinterpret prior rulings of this Court; it merely properly applied those prior decisions to this unique statutory scheme.

The Secretary argues that the decision of the court of appeals is inconsistent with the analysis of this Court in *Eldridge*, 424 U.S. 319 (1976). That contention is patently wrong. In *Eldridge*, this Court ruled that the Secretary's procedures for terminating disability benefits under Title II of the Social Security Act were constitutionally valid even though the Secretary did not provide for an oral pretermination hearing. In so ruling, this Court articulated the three factors which must be considered in analyzing the dictates of due process—they are:

> . . . first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

424 U.S. at 335. After analyzing the Secretary's procedures in light of these factors, this Court determined that those procedures were minimally acceptable because of their "very elaborate" character; the "routine, standard, and unbiased" nature of the reports on which the termination decision was based; and the demonstrated significant governmental burden to provide pretermination disability hearings. Adhering strictly to this three-prong *Edridge* analysis,

the court of appeals here properly balanced the competing governmental and private interests and determined that the Secretary's recoupment procedures were unconstitutional.

1. The Private Interest At Stake Here Is Significant.

Regarding the private interest at stake, the court of appeals correctly rejected the same contentions that the Secretary asserts in his brief, *i.e.*, that the private interest here is not as significant as that in *Eldridge*. He bases his argument not on the regulations and procedures which were reviewed by the court of appeals, but rather he focuses on what he contends are *new* procedures which became effective in January, 1979. As discussed at pp. 20-22, *supra*, notwithstanding these new procedures, the Secretary continues to ignore the clear, mandatory provisions of § 204(b) in analyzing the private interests in this case. In § 204(b), Congress specifically articulated that "there shall be no adjustment . . . or recovery by the United States from any person who is without fault. . .". By so doing, Congress legislated a statutory entitlement to continued uninterrupted receipt of social security benefits for social security recipients who meet the conditions of waiver.

The character of the private interest in the case at bar is also defined by the Secretary's own regulations implemented to comply with the mandate of § 204(b). Those regulations require the Secretary, in making the decision whether to waive overpayment, to weigh very subjective, highly individualized factors such as the recipient's age, intelligence, education and physical and mental condition, in addition to "all [other]

pertinent circumstances," 20 C.F.R. § 404.507. Additionally, these regulations require an inquiry into the recipient's financial situation, *i.e.* his/her ability to repay the overpayment, 20 C.F.R. § 404.508. Thus, unlike the private interest at issue in *Eldridge*, both Congress and the Secretary have expressed strong opinions that social security recipients are vested with the right to keep overpaid monies unless, after a highly subjective inquiry, the Secretary can find he/she was "at fault" or recovery would not be inequitable or defeat the remedial purpose of the Social Security Act.

In the face of the respondents' statutorily-based private interest, the Secretary argues that the court of appeals wrongly found that the "strength of the private interest of [respondents] lies between *Eldridge* and *Goldberg*." 564 F.2d. 1219, 1231. The Secretary's position is that his practice of regularly "suspending" benefits for between one month and one year did not actually constitute a "termination" but was a "temporary reduction in benefits." Op. Br. at 33. Obviously, the Secretary's labels are of no value for they disregard the cruel fact, found by all the courts below, that regardless of what the Secretary called his action, he regularly stopped all monies being paid to respondents and this stoppage continued for several months for each respondent. *See Elliott*, 371 F. Supp. at 966, n. 14. In an effort to strengthen his argument regarding the private interest at stake here, the Secretary claims that these "temporary reducations in benefits" are acceptable in this case because "elderly or disabled recipients are generally eligible for Supplementary Security Income (SSI) welfare benefits under Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.*" Op. Br. at 33-34. This statement grossly exag-

gerates the availability of SSI to Title II recipients. On the one hand, in most states, the monthly SSI payments are set far below the level of the recipient's monthly Title II payment. For example, the plight of Mr. Jordan Silva is illustrative of this situation. Because he worked for over forty years, Mr. Silva is entitled to a monthly Title II benefit of approximately $240.00. If he were found eligible for SSI, his benefits would only be approximately $200.00 per month. He would immediately lose more than 15% of his income.[11] This is a significant loss for recipients who the Secretary acknowledges ". . . depend [on Title II benefits] for the necessities of life." Claims Manual Section 5000; *Elliott* v. *Weinberger*, 371 F. Supp. 960, 967, n. 17. On the other hand there is no question that there is substantial delay in respondents' obtaining any SSI assistance for there is an unlimited initial period in which the SSI officials are permitted to determine an applicant's eligibility and substantial delay periods have been common nationwide. *See* Amicus Curiae Brief filed by the Gray Panthers, at pp. 14-20. Consequently, during this long period, Mr. Silva would have no income from which to pay for food, shelter, and the other essentials of life. Furthermore, if Mr. Silva were ineligible for SSI, and eligible for the limited state funded welfare assistance in Hawaii (general relief), at a maximum, he would receive only $145.00 per month or less than 60% of his Title II check. *See Id.*

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[11] These figures are based on Mr. Silva's current Title II benefits and the present SSI payment for a one person household in Hawaii. If Mr. Silva were forced to apply for and receive State funded general assistance in Hawaii his monthly benefit would be only $141.00 or a loss of almost 40% of his income. *See* Amicus Curiae Brief for the Gray Panthers, at pp. 14-20.

Not only does the Secretary misleadingly argue that these alternative sources of income are readily available, he also incorrectly claims that "there is significant possibility that Social Security recipients will have personal income or resources other than their insurance payments. . .", Op. Br. at 34, and therefore social security recipients in this case have less of a private interest in pre-recoupment oral hearings than did the welfare recipients in *Goldberg*. What the Secretary conveniently fails to tell the Court is that under the Aid to Families with Dependent Children Program (AFDC), 42 U.S.C. § 601, *et seq* (1978), which was the sole source of the recipients' income in *Goldberg*, virtually all states permit welfare recipients to retain liquid assets and other resources and still be fully eligible for AFDC benefits. *See* 45 C.F.R. § 233.20(a)(3) (1977). Moreover, Congress has mandated that certain earnings are to be disregarded in determining the amount of AFDC asistance for working recipients, 42 U.S.C. §§ 602(a)(7), (8) (1978); therefore this significantly large group of AFDC recipients have substantial non-welfare income or resources, yet this Court in *Goldberg*, and again in *Eldridge*, found their private interest sufficient to require a per-termination oral hearing.[12]

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[12] For example, under the AFDC program all recipients may be permitted, depending on the applicable state regulations, to retain up to $2,000 in cash reserves and own an automobile and other liquid assets. *See* 45 C.F.R. § 233.20(a)(3) (1977). Additionally, for working AFDC recipients, because of certain income disregards (*See* 42 U.S.C. § 602(a)(8)), they are able to retain on a monthly basis substantial funds in excess of a state's standard of financial need. This earned income disregard is in addition to reimbursement the recipient receives for all reasonable work expenses. *See generally Shea* v. *Vialpondo*, 416 U.S. 251 (1974). A

Understandably the Secretary ignores these important similarities in the AFDC and Title II programs and he focuses solely on his claim that Title II is not "need based" and that therefore this Court's analysis in *Eldridge* of the private interest involved in *Goldberg* is irrelevant to this case. However, in the instant case, like the compelling financial need in *Goldberg*, financial need is central to the waiver question and to the issue of continued eligibility for either retirement or survivor's benefits. Need is a key factor in *every* waiver request under the Secretary's regulations, because pursuant to 20 C.F.R. § 404.508, the Secretary must decide if the recipient has sufficient income and resources "required for ordinary living expenses." This decision is governed by recipient's dependency "upon all of [the recipient's] current benefits for such needs, that is, an indepth evaluation of the recipient's

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typical AFDC budget for a working recipient with three dependents in Hawaii, for example, would be:

Gross Wages	$500.00
Less Payroll Deductions	35.00
Balance	$465.00
Less Work Expenses	40.00
Balance	$425.00
Less 42 U.S.C. § 602(a)(8) Disregard	161.33
Balance	$263.67

The Hawaii state standard of assistance for this family is $546.00; therefore, the AFDC payment to this family would be $285.33 ($546.00 minus $263.67). Consequently, this family would have approximately $748.33 per month in disposable cash, or approximately $198.33 more than the state standard of assistance. *See* Hawaii Revised Statutes §§ 346-29, 53, 55, (1978); Hawaii Public Welfare Manual §§ 3367, 3368 (1978).

'fixed living expenses' such as food and clothing, his/her 'medical' expenses and 'other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living'." 20 C.F.R. § 404.508(a)(1), (2), and (4)" Furthermore, as the court of appeals found, retired social security recipients are "taxed" for each dollar they earn above the statutory maximum. This "tax," the appellate court found, was very "similar to that found in many welfare programs," *See* generally 42 U.S.C. §§ 602(a)(7) and (8) (1978). In establishing financial need as an essential inquiry in the waiver determination under § 204 and an important factor in continued eligibility of retirees and survivors, Congress treated respondents more like the welfare recipients in Goldberg rather than the beneficiaries of the pure insurance program at issue in *Eldridge*. From the preceeding analysis it is obvious that Title II is an income maintenance program like AFDC and that for purposes of the nature of the private interest at stake in determining need for a pre-recoupment oral hearing, these programs are analogous.[13]

After six and one half years litigation in this case, the Secretary for the first time in his Opening Brief reveals what he asserts are new Claims Manual provisions which will "liberalize previous practices. . ."

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[13] Of the plight of such persons directly subjected to the Secretary's recoupment procedures, the district court stated that these recipients were in "brutal need" in the *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) sense because:

> Starvation may be slower if benefits are reduced or suspended rather than terminated in *Goldberg*, but some recipients will suffer nonetheless. 371 F. Supp. at 970.

Op. Br. at 33. The Secretary attempts to portray to this Court that the procedure under this new system, never reviewed by any of the courts below, is as follows:

> Under the new Claims Manual provisions that will become effective in January 1979 (App., *infra.*), recoupment generally will not require more than a 25 percent reduction in monthly benefits unless the overpayment was obtained by fraud or the beneficiary still has the overpaid amount in his possession. *In the absence of fraud or retention of the overpayment, the Social Security Administration will no longer propose temporary interruption of monthly benefits.* Op. Br. at 31. (Emphasis added.)

Consequently, at pages 31-33 of this brief, the Secretary vigorously contends that these regulations substantially alter the private interest which the recipient has at stake in obtaining a pre-recoupment oral hearing under this Court's decision in *Matthews* v. *Eldridge*, 424 U.S. 319 (1976). Unquestionably, since the Secretary premises his entire legal argument regarding the private interest here on these new procedures and he does not address the recoupment procedures invalidated by the court of appeals, there has been a drastic change in position by the Secretary. Whereas before the court of appeals the Secretary argued, *inter alia*, that his current recoupment procedures were valid even though it was his practice to suspend indefinitely respondents' entire monthly check, now, because of these new procedures, he contends there is no deprivation, only a temporary, limited reduction of

the recipient's property interest. By this maneuver, the Secretary is attempting to have this Court validate a system which he concedes may be substantially different from the one before the lower courts. This he cannot do for it is the settled law of this Court that it will not be misled into issuing advisory opinions. *EPA* v. *Brown*, 431 U.S. 99, 103-104 (1977); *Fusari* v. *Steinberg*, 419 U.S. 379, 387-388 (1975); *Richardson* v. *Wright*, 405 U.S. 208, 209 (1972).

Moreover, a close reading of this new, untested procedure shows that it will not significantly change the Secretary's present practice to conform with the court of appeals' decision in this case. On its face the changes emphasized by the Secretary are minor. First, it is unquestionable that the Secretary has not provided for the opportunity for the pre-recoupment oral hearing required by the court of appeals. In lieu of complying with the appellate court decision, the Secretary has merely extended the situation in which he will grant what he terms as "partial adjustment," *i.e.*, a monthly withholding of up to 25% of the recipient's check. However, the criteria for determining who, under these new procedures, is entitled to partial adjustment are identical to the § 204(b) waiver standards, *i.e.*, fault and hardship. Apparently, partial adjustment will *not* be granted where the recipient is "at fault" or where full suspension of benefits would not cause a hardship. As discussed in more detail *infra* at 25-26, an evaluation of fault for any purpose under the Secretary's own procedures, *see* 20 C.F.R. § 404.507 and Claims Manual § 5540-5547.8 (See Appendix "A" attached hereto), requires an in-depth analysis of whether the recipient knew, should have known, or could have known that there had been an

overpayment.[14] It is precisely these difficult, highly subjective fault determinations which require an opportunity for a pre-recoupment oral hearing. Since the Secretary's new procedures necessitate the application of the same legal standards to very individualized factual situations, these new procedures certainly do not, in the Secretary's terms, "liberalize" the recoupment process in any significant manner.

Secondly, apparently these new procedures prohibit the Secretary from granting "partial adjustment" to recipients who assert their statutory rights to waiver. If this is an accurate interpretation of this new, untested Claims Manual procedure, then undoubtedly this procedure conflicts with § 204(b) and its requirement that the recipient is entitled to a waiver decision *before* losing his/her social security benefits. Finally, this partial adjustment scheme is entirely permissive—it is completely within the discretion of the Sec-

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[14] Indeed, Claims Manual § 5547.4 provides that:

(a) General

An overpaid person will not be found "without fault" if the evidence shows a lack of good faith or failure to exercise a high degree of care in determining whether an event that might cause deductions or terminations of entitlement should be reported.

(b) Degree of Care

A high degree of care is expected of a person. However, it may vary with the complexity of the circumstances giving rise to the overpayment and the capacity of the particular payee to realize that he is being overpaid. *Accordingly, variances in the personal circumstances and situations of individual payees are to be considered in determining the high degree of care expected of them.* (Emphasis added.)

retary when and to whom partial adjustment will be granted.

Not only is it clear that these new procedures recently disclosed by the Secretary do not reduce the significant private interest of respondents in a pre-recoupment oral hearing, it is also certain that by attempting to accommodate recipients whom he apparently intends to benefit by partial adjustments, the Secretary is acknowledging the great private interest involved in this case. Undoubtedly the Secretary is directing these partial adjustments to recipients whom the Secretary finds are not intentionally at fault but for whom full suspension would cause a hardship. By so doing, the Secretary properly recongizes that many social security recipients rely on their benefits as their only source of income and subsistence.

Consquently, these new procedures do not alter the significant deprivation of monthly social security benefits which does, and will still, result from the Secretary's ex parte recoupment procedures. The facts, as found by *all* of the courts below, and the secretary's practice belie the Secretary's claim that there is not a substantial deprivation. It is undisputed in the record that it is the Secretary's regular practice to suspend benefits entirely, and only later make "partial adjustments". *Elliott*, 371 F. Supp. at 966, n. 14. While the length of the period of suspension varies with the amount of the alleged overpayment and the recipient's monthly entitlement, there can be no question that these suspensions of benefits had devasting effects on social security recipients who depend on their benefits as their sole source of income. Thus, the court of appeals correctly decided that respondents'

private interests under § 204(b) are greater than those scrutinized n *Eldridge* and are like the private interests of welfare recipients in *Goldberg*.

2. The Risk Of Error Under The Secretary's Procedures Is Great And The Value Of An Oral Pre-recoupment Hearing Is Substantial.

The court of appeals also properly evaluated the risk of erroneous deprivations under the Secretary's challenged recoupment procedures and correctly determined that an opportunity for an oral pre-recoupment hearing was necessary in order to make proper waiver decisions. This conclusion is entirely in harmony with the *Eldridge* decision.

In *Eldridge*, this Court reviewed procedures in which the Secretary made an initial determination of continued disability *after* that determination had been previously reviewed by a separate state agency and based solely on reports which were "routine, standard, and unbiased." 424 U.S. at 344, quoting *Richardson* v. *Perales*, 402 U.S. 389, 404 (1971).[15] Here, the

[15] Indeed, it is evident that the Secretary's position regarding the objectivity of the disability determination process has changed several times. Just a few short years ago, in his brief to this Court in *Eldridge*, the Secretary repeatedly argued that evidence of disability is "uniformly recognized" to be reliable and "cross-examination is of limited value." Op. Br. at 41, 42. *Eldridge*, Op. Br. at pp. 12-13, 40-41, 42, 44. However, in this case, he now claims that the court of appeals "underestimated the role of creditability" in disability cases and that disability decisions "may well depend on subjective factors." The obvious inconsistency of these positions demonstrates the Secretary's willingness to represent inconsistent claims to this Court on different occasions about the same administrative scheme.

decision-making process and the information used in that process is significantly different. The Secretary makes an *ex parte* determination of an alleged overpayment but this is *not* the issue to be reviewed at a pre-recoupment hearing in waiver cases. Rather, at the hearing the recipient seeks an *initial* ruling on whether the overpayment should be waived pursuant to § 204(b). At the outset it is important to note that under the Secretary's written submission procedure the waiver decision is not made at one of the approximately 800 local district offices social security administration. Waiver is decided at one of the seven (7) regional offices, geographically far removed from the recipient, based solely on the written information submitted by the appropriate district office. This is important because there is certainly much less opportunity here for the recipient to "mold" his argument than there was in *Eldridge* where only routine medical reports were at issue. Also, unlike *Eldridge* where the beneficiary was involved in the decision-making process from the outset on the issue which was critical to the beneficiary, (*i.e.*, whether he/she was "disabled"), here the Secretary begins the recoupment process without the recipient's involvement and he only postpones that process for a short period to receive written information regarding the recipient's "fault" and "ability to repay."

Again unlike *Eldridge*, the waiver question requires the assessment of fundamentally different evidence and the application of highly subjective legal standards. In order to make a waiver determination, the decisionmaker must analyze and weigh the very individualized and personalized evidence which is determinative of whether a recipient is "at fault" in causing the overypayment and whether he/she is able to repay. The subjective nature of the inquiry is exemplified by the fact that under the Secretary's regulations, a recipient may still be at fault "even [though] the administration may have been at fault in making the overpayment," or if he/she "knew or could be expected to know" an overpayment would occur from his/her receipt of excess benefits. 20 C.F.R. § 404.507(c). These regulations state unequivocally that this fault determination must be based on *facts*. Included in the facts which are required to be considered by the Secretary is the recipient's "age, intelligence, education, and physical and mental condition." 20 C.F.R. § 404.507. As is evident from the Secretary's regulations, this fault decision is very fact-intensive and credibility-based and this decision can be made only by an oral pre-recoupment hearing.

For example, such a proceeding would have been invaluable for Mrs. Yamasaki since the Secretary had determined that she owed $207.90 and the stated reason was that it was due to the Secretary's "processing error." The only fair means for the Secretary to evaluate whether Mrs. Yamasaki "knew or should have known or could be expected to know," about the incorrect payment is through an oral hearing at which she is questioned and testifies. This conclusion is underscored by the fact that because the waiver decision is made at one of the seven regional offices, based solely on the written information submitted by one of the 800 local district offices, Mrs. Yamasaki is foreclosed from molding her argument to the interests of the decisionmaker. Moreover, it is evident from the highly subjective nature of the waiver inquiry that Mrs. Yamasaki and other lay witnesses would be tes-

tifying on the fault and hardship issues at the pre-recoupment hearing and that, unlike the expert evidence at issue in *Eldridge*, this testimony is virtually indistinguishable from that to be heard in *Goldberg*.

In his brief, the Secretary renews his argument that the determination of whether a recipient "knew or should have known or could be expected to know" that the retention or receipt of an overpayment was improper is an objective test. Op. Br. at 42. The court of appeals soundly, and properly, rejected the Secretary's contention that the fault decision is based on an objective test and that therefore no oral hearing is necessary. As the court of appeals explained:

> The decisionmaker has to hear the claimant's story in order to determine whether he "should have known," To say that he need not hold a hearing just because in some cases claimants will fail to meet their burden after testimony, is absurd. Since § 404.507 requires the reasonable person to be viewed in the claimant's own circumstances and with whatever mental and physical limitations the claimant might have, the claimant must be given an *effective* opportunity to communicate these characteristics to the decision-maker. The very test which might permit a decision on documentary evidence alone as a matter of administrative law, is itself dependent upon information which can effectively be adduced only at an oral hearing.

564 F.2d. 1219, 1233, n. 19. (Emphasis in original.)

All the courts below recognized the importance of providing social security recipients with a meaningful

opportunity to communicate with the decisionmaker and that the Secretary's written submission procedure was totally inadequate. This conclusion of the lower courts is premised, in part, on an accurate assessment of the capabilities of the social security recipients who are limited by the Secretary to written submissions for waiver decisions. As Judge King found in *Elliott*, a recipient only "nebulously" understands the Secretary-challenged procedures because

> [M]any of these claimants (seeking waiver) are elderly and disabled people whose capabilities may frustrate an effective presentation of their case.

Elliott v. *Weinberger*, 371 F. Supp. at 966. Indeed, the Secretary in his brief to this Court in the case of *Richardson* v. *Wright*, 405 U.S. 208, 216 (1972) (dissenting opinion of Justice Brennan) acknowledged that old-age recipients could not effectively employ a written submissions system. Therefore, this Court's admonition in *Goldberg* that written submissions were

> an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively

397 U.S. at 269, is equally applicable to the Secretary's recoupment procedures.

Similarly, once the thorny, creditability-based fault issue is resolved, the Secretary then must determine whether it would be "against equity and good conscience" or "defeat the purposes of (Title II)." This evaluation, as detailed by the Secretary's regulations,

20 C.F.R. §§ 404.508 and 404.509, requires an in-depth analysis primarily of the recipient's financial needs; the state of the recipient's knowledge about his entitlement to the overpayment monies; and a determination of whether the recipient detrimentally relied on receipt of the overpayment. Again, this is clearly the type of evidence which goes far beyond the "routine, standard" medical reports at issue in *Eldridge*. Because of these critical differences in the evidentiary and legal standards, the court of appeals properly ruled that the Secretary's recoupment procedures were illegal.

Another relevant factor under the *Eldridge* analysis is the relative reliability of the existing procedure. In assessing the value of statistics as a gauge of the reliability of a procedure in *Eldridge*, this Court stated that "statistics rarely provide a satisfactory measure of the fairness of the decision-making process." *Eldridge, supra*, at 346. A further caution is necessary since the Secretary belatedly offers statistics which were never presented to either the court of appeals or the district courts. Even if statistics are relevant, certainly the proper yardstick under *Eldridge* is *not* the reliability of the procedures *after* court-ordered changes have been made. Consequently, the Secretary's profferred statistics are an invalid measure of the relative reliability of his challenged procedures because those statistics are based on his experience under the improved, court-ordered procedures. Also, as previously discussed, *see* pp. 2-3, *supra*, these unsubstantiated statistics are not part of the record in this case and thus they must be disregarded. Moreover, as the court of appeals correctly observed, statistics, like those offered by the Secretary, are wholly irrelevant to determine the reliability of the court-

ordered procedures unless those statistics definitively show abuse by establishing a significant number of frivolous hearing requests. 564 F.2d. at 1234. Absent such a showing, which understandably the Secretary cannot make, statistics, like those belatedly disclosed by the Secretary, are of no value.

Before the court of appeals, the Secretary claimed, as he does here, that because there was a low "overall" number of recipients who had obtained successful relief, his procedures were reliable. Op. Br. at 47. However, the Secretary wrongly draws from the entire overpayment population and not from those who actually sought waiver. Since the Secretary makes no waiver determination until asked by the recipient and since § 204 grants the rights of waiver to *every* overpaid recipient, this distinction is crucial and it shows the unacceptably high error rate prior to the district court decisions in this case. That is, there is almost a 75% error in the pre-*Elliott* procedures[16] This is a far

[16] Specifically, Judge King, in *Elliott*, found that in 1970 (the latest figures available at that time) the reversal rate was over 73%. That is, of the estimated 12,000 requests for reconsideration and waiver, over 8,000 finally succeeded in obtaining full relief. 371 F. Supp. at 967. Also, in light of the actual findings by all of the lower courts, it is very likely that this group would be larger if the Secretary adequately informed recipients of their rights to waiver and reconsideration (the Secretary's form notice was found to be constitutionally invalid), and if the Secretary facilitated filing for reconsideration and waiver (recipients were not provided with waiver and reconsideration forms and even when submitted, they did not toll recoupment). Given the inadequacies of the Secretary's notice and the difficulties for recipients initiating the reconsideration/waiver process, these figures are very dramatic, for undoubtedly these failures of the system discouraged or thwarted many recipients from exercising their right to waiver.

more significant error rate than was presented in *Eldridge* where this Court found that disability termination procedures produced between a 3.3% and 56.8% error rate. 424 U.S. at 346 n. 19b. Also, the error rate in *Eldridge* was far more crucial because there the Secretary may have been paying *ineligible* persons during the hearing process. Such is not the case here because unlike *Eldridge* respondents' eligibility for their social security benefits is *never* at issue. In light of these statistics, it is evident that the Secretary's challenged procedures allowed him to reduce or suspended social security payments when, in view of Section 204(b), he absolutely has no right to do so. Nothing in *Eldridge* alters the conclusion that the Secretary's procedures are highly unreliable and it is only through pre-recoupment oral hearings that proper safeguards will be provided.

3. The Public Interest At Stake In Recoupment Decisions Compels The Secretary To Provide The Opportunity For A Pre-Recoupment Oral Hearing

The final factor in the *Eldridge* analysis is a balancing of the public interest at stake in recoupment decisions, including the governmental function involved and the fiscal burden that those additional safeguards entail. As discussed at p. 16 *supra*, by enacting the language of § 204(b) Congress strongly expressed the overriding public interest in protecting social security recipients' rights to uninterrupted benefits until *after* the Secretary has made a proper waiver decision. No such compelling public expression of the public's interest was present in *Eldridge*.

For several additional reasons, it is clear that it is in the public's interest for the Secretary to provide pre-recoupment oral hearings. First, there is no reason to assume that there would be a significant increase in the number of hearing requests, or that the Secretary has a strong fiscal interest in not providing pre-recoupment oral hearings. Indeed, since the issue in this case is the *timing* of the waiver hearing, not whether a hearing must be held, it cannot be argued seriously that there are any significant additional fiscal or governmental burdens imposed by requiring the Secretary to provide pre-recoupment oral hearings on waiver. The decision by the court of appeals only requires the Secretary to alter the timing of this hearing, not to provide hearings in situations where he had not been previously doing so. 564 F.2d, at 1235. Hence there is no question that the court of appeals' ruling would not cause *additional costs* by requiring that a hearing take place before, rather than, after recoupment.

Moreover, contrary to the Secretary's assertions, *see* Op. Br. 48-49, there is no threat of additional fiscal burden in this case because of the possibility recipients would file for the pre-recoupment hearing solely as a means of delaying recoupment. This is true for several reasons. On the one hand, there is absolutely no evidence in the record of this case to support the Secretary's contention that the court of appeals' decision will result in increased hearing requests. *See* Op. Br. at 49-50. Rejecting this claim by the Secretary, the court of appeals accurately summarized the record on this point when it stated that "[t]here has been no showing that the percentage of challenges will increase substantially or that the number of hear-

ings will rise inordinately." 564 F.2d. 1219, 1235. Additionally, as the court of appeals correctly observed:

> If requiring pre-recoupment hearings would result in the filing of frivolous requests in order to delay recoupment, the present procedure should also encourage frivolous written requests for reconsideration or waiver. This is so because the present practice of the Secretary is to delay recoupment until after a determination by the Department that the request should not be granted.

564 F.2d. 1219, 1234.

On the other hand, to the extent there is any fiscal burden caused by the Secretary's forestalling recoupment until after the opportunity for an oral hearing, again there is an identical burden even under the procedures he so vigorously defends. The court of appeals specifically addressed the Secretary's claim of additional costs incurred due to delay by correctly distinguishing between the effect of delaying recoupment in this case and the consequence of the Secretary's forestalling termination in the *Eldridge* situation. As the court accurately explained:

> In the instant case we merely require the Government to exercise a little forebearance before taking money from the claimants via recoupment. There will be few if any situtations when payments will be made to ineligible persons during the course of the review. Generally, the claimant's eligibility is not at issue, the only question being whether, or when and how, his payments

> should be subject to temporary recoupment deductions.

Elliott, 564 F.2d at 1235.[17]

In an effort to quantify the alleged additional governmental costs in this case, the Secretary claims in his brief that "the 30 day notice period alone results in an annual loss of at least $850,000 in interest that could be earned if overpayments were recovered more expeditiously." Op. Br. at 47. The Secretary then proceeds, in a footnote, on the basis of 1978 statistics to detail how he reached that figure. Later in this section of his brief, the Secretary states that he "estimates that the direct cost of conducting 1,200 oral hearings annually is $100,000." Op. Br. at 48. Respondents strongly object to the untimely introduction of this factual matter into the record of this case. Respondents have never been provided with any documentation to support these claims and they have been denied any semblance of a fair opportunity to determine the authenticity, accuracy or source of these figures. Unquestionably the Secretary has attempted to supplement the record in this case with unsubstantiated factual material in direct contravention of one of the most basic admonitions of this Court that

> *This court must affirm or reverse upon the case as it appears in the record.*

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[17] In contrast, in *Eldridge* a prior hearing requirement might often result in forcing the Secretary to pay benefits to persons who were not only not ineligible for them, but who in all probability would be unable to repay. *Elliott*, at 1235, citing *Eldridge, supra*, 424 U.S. at 348.

Russell v. *Southland*, 53 U.S. (12 How.) 139, 158-159 (1851). (Emphasis added.) Respondents have been severely prejudiced by the Secretary's actions and, therefore, they urge this Court to strike page 47 and 48 of his brief or, at a minimum, disregard these offending pages.

Addressing these unsubstantiated "direct" and "indirect" cost guesses of the Secretary, it is abundantly clear that they are either inflated, erroneous, or entirely speculative, and hence they should be ignored by this Court. First, these figures must be read in light of the Secretary's own previous cost estimates in this case. In seeking a stay of the *Buffington* district court judgment in this Court and before the district court in *Elliott*, the Secretary represented, again without any corroboration, that the cost to provide pre-recoupment hearings would be between $15-40,000,000, *see e.g.*, *Elliott* v. *Weinberger*, 371 F. Supp. at 970-71, n. 31, while the actual cost was merely $100,00. Certainly the variance in these figures demonstrate the total unreliability of the Secretary's cost claims. Second, the Secretary contends that his $100,000 figure does not include the "losses incurred because of inability to recover overpayments after a prolonged pre-recoupment period . . ." Op. Br. at 50. This claim is misleading because it has been the Secretary's choice, and not the court of appeals decision, which has "prolonged" the recoupment process; the Secretary chose to continue the written submissions procedure, the opportunity for a pre-recoupment oral hearing and the post recoupment evidentiary hearing rather than follow the model successfully used in many other administrative systems of providing only one opportunity for a hearing, *prior* to any adverse

administrative action. Additionally, as discussed above at page 32, the Secretary overlooks the fact that in almost all cases social security recipients seeking waiver are *eligible* for benefits, and he is, therefore, fully secure as to recovery of any overpayment.

Moreover, the Secretary seeks to claim as indirect cost, the monies allegedly overpaid to the recipients and the interest, if any, on that money. This is certainly erroneous because a substantial portion of these funds are funds which Congress intended to be waived and, thus, would be at issue even under the challenged procedures. Furthermore, even under the Secretary's challenged procedure the Secretary would "lose" interest for at least the initial 30-day tolling period. Again, any alleged loss of interest under the court of appeals ruling is directly attributable to the Secretary's decision to delay the timing of the pre-recoupment oral hearing benefits beyond this 30 day period. Even though the Secretary chose to delay further, he still seeks to claim monetary loss, on interest, due to the court of appeals decision and not due to that choice. Obviously, there is no real loss of interest and the Secretary's attempts to assert that there is, conflict with the facts in this case.

Also, the Secretary contends that there is an "indirect" cost in that the pre-recoupment hearings will require the diversion of resources which could be used by the Social Security Administration for other, unspecified needs. The Secretary's procedures and statistics in the record belie the contention: as shown at pp. 30-31, *infra*, the Secretary must incur these costs even under the challenged procedures. Furthermore, the court-ordered safeguards in *Elliott* have *improved* the decision-making by reducing the error rate by

approximately 25%. That is, 25% fewer errors are being made under the present system than under the previous one. This is borne out of by the Secretary's own statistics which show a 50% reversal rate at the waiver determination stage now as opposed to the nearly 75% rate which Judge King found in *Elliott.* 371 F. Supp. at 967.

Furthermore, not only is the dollar cost to comply with the court of appeals decision negligible but also the number of hearings requested is very modest. Again, using the Secretary's belatedly submitted statistics, he shows only 1,200 personal conferences, *i.e.* oral pre-recoupment hearings, requested during the calendar year 1977. Not only is this a very small number of hearings at a very small cost, but the Secretary ignores the fact that these hearings would be held even under the challenged procedures, so surely they cannot be fairly labeled an "additional cost."

Like *Goldberg*, and unlike *Eldridge*, such a pre-recoupment waiver hearing is invaluable for the decision-maker in the instant case for it enables the Secretary's representative to confront the recipient in order to assess his/her culpability, needs and credibility and for each party to cross-examine witnesses. This can be accomplished readily by the type of procedure presently employed by the Secretary in response to the lower court's orders—a short personal conference with an impartial employee of the Social Security Administration at which time the recipient presents testimony and evidence and cross-examines witnesses, and the administrative employee questions the recipient. Such a procedure is the same one successfully and effectively now employed by many administrative agencies to determine, for example, eligibility for welfare, food stamps and medical assistance. *See e.g.,* 45 C.F.R. § 205.10 (1977); 7 C.F.R. § 271.1(n) (1976); 45 C.F.R. § 205.10 (1977). The administrative costs, both in terms of money and personnel, are small, while the administrative gain, in terms of reliability and efficiency in decision-making, is great.

For these reasons, it is clear that the public interest will be well served by requiring the Secretary to conduct pre-recoupment oral hearings. The minimal fiscal impact on the Social Security Administration, coupled with the insubstantial inconvenience to the Secretary's existing bureaucracy, pales when compared to the often devastating impact the present procedures have on large numbers of recipients who have suffered or will suffer from recoupment pending the waiver determination. After balancing the private interest, the risk of error and the public interest, it is evident that the court of appeals decision is correct and should be affirmed.

II.

THE DISTRICT COURTS HAD SUBJECT MATTER JURISDICTION TO GRANT CLASS AND INJUNCTIVE RELIEF

A. Under 28 U.S.C. § 1361, The District Courts Had Jurisdiction To Grant The Relief Sought.

The court of appeals found that the district courts had properly exercised subject matter jurisdiction over these cases pursuant to 28 U.S.C. § 1361. In so ruling, the court specifically rejected the Secretary's

claim that § 1361 jurisdiction was precluded by § 205(g) of the Social Security Act and this Court's interpretation of that section in *Salfi* v. *Weinberger*, 422 U.S. 749 (1975), *Matthews* v. *Eldridge*, 424 U.S. 319 (1976) and *Califano* v. *Sanders*, 430 U.S. 99 (1977). For several reasons this conclusion is the only one consistent with a substantial body of federal decisional law, with the congressional purposes in enacting § 1361, and with assuring access to federal courts to social security recipients like respondents who are challenging the constitutionality of the Secretary's *procedures* and *not* the *merits* of their claim for statuory benefits.

1. The Court Of Appeals Decision Is Consistent With Decisions Of Other Federal Appellate Courts

The pertinent provision of § 1361 relied upon by the court of appeals for subject matter jurisdiction states that district courts have

> original jurisdiction of any action in the nature of mandamus to compel an officer of the United States or any agency to perform a duty owed to the Plaintiff.

Since its enactment in 1962, § 1361 has been interpreted by federal district and appellate courts on numerous occasions and these courts have repeatedly agreed that § 1361 jurisdiction is available in cases like this which present constitutional due process questions, rather than individual claims for benefits. *White* v. *Mathews*, 559 F.2d, 852, 855-56 (2d Cir. 1977) *cert. denied sub nom; Califano* v. *White*, 435 U.S. 908 (1978); *De Lao* v. *Califano*, 560 F.2d 1384, 1388 (9th

Cir. 1977); *Ryan* v. *Shea*, 525 F.2d 268, 271-72 (10th Cir. 1975); *Frost* v. *Weinberger*, 515 F.2d 57, 61-62 (2d Cir., 1975), *cert. denied*, 424 U.S. 958 (1976); *Brown* v. *Weinberger*, 529 F.2d 514 (4th Cir. 1975); *Knuckles* v. *Weinberger*, 511 F.2d 1221, 1222 (9th Cir. 1975); *Workman* v. *Mitchell*, 562 F.2d 1201, 1205-06 (9th Cir. 1974); *Martinez* v. *Richardson*, 472 F.2d 1121, 1125-26 (10th Cir., 1973). *See also Naporano Metal and Iron Co.* v. *Secretary of Labor*, 529 F.2d 537, 539-40 (3rd Cir. 1976); *Chaudoin* v. *Atkinson*, 494 F.2d 1323, 1329-30 (3rd Cir. 1974); *Peoples* v. *U.S.D.A.*, 427 F.2d 561, 564-65 (D.C. Cir. 1969) (and cases cited therein).

Applying the identical jurisdictional analysis mandates by this Court in the context of other jurisdictional statues, these courts of appeal have uniformly ruled that mandamus jurisdiction is appropriate to either compel compliance with due process requirements or to "declare the due process requirements applicable to [the challenged] requirements." *Workman* v. *Mitchell*, *supra*, at 1206. That is, where the plaintiff has asserted a "not insubstantial" constitutional claim against a federal official, all of these federal appellate courts agree that § 1361 is a proper basis for subject matter jurisdiction.

Here, as in *Frost*, *supra*, *Ryan*, *supra*, and *White*, *supra*, respondents challenge the legality of a federal official's actions (the Secretary's recoupment procedures) which they alleged, and proved, contravene that official's duty under either the constitution (*i.e.*, the fifth amendment) or the Social Security Act (*i.e.*, § 204(b). Indeed in *Frost* v. *Weinberger*, *supra*, a case virtually identical to the case at bar, Judge Friendly ruled that a determination of the scope of the duty owed by the Secretary under the Social Security Act

and the due process clause of the fifth amendment to provide full evidentiary hearings *before* reducing survivors' benefits (based on competing claims by a deceased wage earner's illegitimate and legitimate children) was "peculiarly appropriate" for decision by a district court under § 1361. 515 F.2d at 62.[18]

Similarly, the duties respondents claimed were owed to them were consistent with prior rulings of this Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and its progeny because the necessity for a pre-recoupment oral hearing here is indistinguishable from the necessity for such hearings in *Goldberg* and subsequent cases. Certainly, the district courts in the instant case could not find that the claim that the Secretary was required by the constitution or § 204(b) of the Act to provide the opportunity for a pre-recoupment oral hearing on the question of waiver was

> so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy with the jurisdiction of the District Court, whatever may be the ultimate resolution of the . . . issues on the merits.

Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661, 666-669 (1974). (Citations omitted.)

[18] It is noteworthy that the Secretary sought review by this Court of the *Frost* decision and review was denied approximately nine (9) months after this Court's decision in *Salfi* v. *Weinberger*, 422 U.S. 749 (1975). *Salfi* was decided on June 26, 1975 and certiorari was denied in *Frost* on March 8, 1976. *See* 424 U.S. 958 (1976).

The Secretary's contention that the foregoing jurisdictional test for mandamus jurisdiction employed by the court of appeals was improper is entirely without merit. Under the Secretary's position, the district courts would have been required to decide the merits of respondents' claims *before* determining subject matter jurisdiction. This approach is not only totally inconsistent with the teachings of the decisional law of this Court, *see e.g.*, *Hagans* v. *Lavine*, 415 U.S. 528 (1974), but also, the Secretary's position wrongly confuses the district court's determination of jurisdiction with a decision on the merits of this case.[19] Moreover, as the court of appeals correctly observed, there can be no question that mandamus jurisdiction is avail-

[19] These decisions are anchored in the teachings of this Court that

> Jurisdiction . . . is not defeated as respondents seem to contend by the possibility that averments might fail to state a cause of action on which petitioners could actually recover. For it well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. *Bell* v. *Hood*, 327 U.S. 678, 682 (1946) (citations omitted).

and furthermore that:

> Once a federal court has ascertained that plaintiffs' jurisdiction conferring claims are not insubstantial on their face, *Engineers* v. *Chicago R.I.&P.R. Co.*, 382 U.S. 423, 428 (1966), "no further consideration of the merits of the claims[s] [are] relevant to a determination of the court's jurisdiction of the subject matter." *Hagans* v. *Lavine*, 415 U.S. 528, 542, n. 10 (1974) quoting *Baker* v. *Carr*, 369 U.S. 186, 199 (1962).

able because the respondents challenged a matter about which the Secretary has no discretion. "Either [the Secretary has] met his constitutional duty to provide a certain minimum, or he has not. He has no discretion to provide less than that constitutionally required." 564 F.2d 1219, 1226.

Additionally the Secretary's assertion that mandamus jurisdiction is improper because there was a clear legal remedy under § 205 for respondents is misleading. On the one hand the Secretary has argued throughout this litigation that mandamus jurisdiction is foreclosed by § 205(g) and that the district court is barred from issuing injunctive or class-wide relief, and yet on the other hand he now boldly asserts that § 205 relief is a complete legal remedy for respondents. The absurdity of this claim is shown by the fact that respondents, in the language of § 205(g), did not seek that the district courts "affirm, modify or reverse" any decision of the Secretary; rather respondents sought affirmative relief from unconstitutional and illegal procedures used in recovering overpayments. Certainly, there is no doubt that the Secretary's position on the extremely limited scope of relief available under § 205 cannot be harmonized with his unsupportable claim that § 205 provides a full, complete legal remedy so as to preclude the availablity of mandamus jurisdiction.

2. The Court Of Appeals Ruling Is In Harmony With The Recent Decisions Of This Court.

Despite the Secretary's assertion that 205(g) of the Social Security Act is the only avenue for judicial review of all Title II cases, *see* Op. Br. at 56-57, the

court of appeals ruling is consistent with this Court's decisions in *Weinberger* v. *Salfi*, 424 U.S. 749 (1972), *Matthews* v. *Eldridge*, 424 U.S. 319 (1976) and *Califano* v. *Sanders*, 430 U.S. 99 (1977). In *Salfi*, *Eldridge*, and *Sanders* this Court distinguished between cases under Title II of the Social Security Act which involve constitutional challenges and those involving individual claims for benefits with questions related to their merits of such claims. Applying that distinction in this case, the court of appeals correctly concluded that this due process challenge was entirely beyond the province and competence of the Secretary; this conclusion is entirely consistent with the reasons stated by this Court for its rulings in *Salfi*, *Eldridge*, and *Sanders* regarding the availability of direct federal court review in cases challenging the constitutionality of the Secretary's procedures or process. As articulated in the *Sanders* opinion, this Court recongized that without specific proof of congressional intent *Salfi* and *Eldridge* do not support the Secretary's argument that § 205(h) bars federal jurisdiction for constitutional claims such as ones at bar. In *Sanders*, this Court stated that:

> [T]hose cases [*Salfi* and *Eldridge*] merely adhered to the well-established principles that when constitutional questions are at issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extradordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by "clear and convincing" evidence.

Sanders at 109 quoting *Salfi*, 422 U.S. at 762.

Nothwithstanding this *Sanders* ruling, the Secretary argues that merely by enacting § 205(h) Congress impliedly intended to bar all suits under Title 28 (1934 ed.) 52, and even to foreclose the later enacted § 1361. Op. Br. at 56. The Secretary's argument not only has no proof of supportive legislative intent, it also ignores the fact that when Congress has sought to limit the availability of mandamus jurisdiction, it has specifically enacted appropriate legislation. *See* 38 U.S.C. § 211(a) (1970), amending 38 U.S.C. § 211(a) (1958), 2 U.S. Code Cong. & Admin. News., at 3729-31 (1970) (precluding § 1361 jurisdiction over veterans benefits suits). In addition, the Secretary exaggerates the importance of the 1948 recodification of all jurisdictional statutes under Title 28. Congress specifically stated in 1948 that:

> *No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 . . . in which any section . . . is placed . . .*

Act of June 25, 1948, ch. 646 Stat. 669, Misc. Prov. § 33. (Emphasis added.) The foregoing legislation eliminates any doubt that the Secretary's arguments implying congressional intent from the 1948 recodification are meritorious.

Moreover, the Secretary's contention is wholly without merit because it also ignores this Court's admonition in *Eldridge* regarding the purposes of § 205 jurisdiction in general and the finality requirements of § 205(g) (*see Salfi, supra)* in particular. In *Eldridge* this Court stated that the

> . . . core principle that these staturorily created finality requirements should be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injury to be suffered remains applicable here.

424 U.S. at 322, n. 12.

It is precisely because of the importance of maintaining some federal court review of Title II cases so as to avoid irreparable injury that the court in *White* v. *Califano*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), when confronted with facts analytically indistinguishable from those in respondents' case, ruled that § 1361 jurisdiction was available to the plaintiff social security recipients in their suit challenging the administrative hearing delays in adjudicating initial disability insurance claims. In *White*, plaintiffs alleged, and the court of appeals agreed, that these delays (averaging 211 days between the date of the hearing request and the final decision by the administrative law judge) violated their rights under § 205(b) of the Social Security Act. Additionally, the plaintiffs in *White* asserted that these delays contravened the due process clause of the fifth amendment. There, as here, the Secretary contended that the district court lacked jurisdiction under § 1361 because it was precluded by §§ 205(g) and (h). In rejecting the Secretary's argument, the court of appeals ruled that since *White* was not a suit seeking a decision whether the plaintiffs were ultimately entitled to social security disability benefits, *Salfi* did not preclude § 1361 jurisdiction and the Secretary owed a sufficient duty under the social security act to support mandamus jurisdiction. *White, supra*, at 856. The court then affirmed the district court's judgment in favor of plaintiffs. In unsuccessfully seeking a writ of

certiorari to review the ruling, the Secretary advanced the same arguments as in the case at bar.

Like the plaintiffs in *White*, respondents are challenging the Secretary's failure to perform a clear duty owed to them and the court's finding that § 1361 jurisdiction was proper in *White* was based on its analysis of the Social Security Act—it did not even reach the plaintiffs' constitutional claim. Indeed, if the court of appeals rejection in this case of the Secretary's attempt to bar § 1361 jurisdiction in Title II case were not a proper application of this Court's rulings, then respondents (and certainly the plaintiffs in *White)* would be foreclosed from any meaningful review of their due process claim; their only redress would be to appeal belatedly in individual cases to a district court which could *not* grant them class or injunctive relief after they were subjected to the very process they allege is illegal. Hence by relying on the limited ruling in *Salfi* and by ignoring this Court's holdings in *Eldridge* and *Sanders*, the Secretary is attempting to prevent judicial review in all Title II cases where constitutional and statutory challenges are made to the Secretary's administrative procedures or practices. The untenability of this position is clear.

3. The Court Of Appeals Decision On § 1361 Effectuates The Legislative Intent In Enacting § 1361.

Not only is the Secretary's argument that § 1361 jurisdiction is unavailable wrong for the foregoing reasons, it also conflicts with Congress' intent in passing § 1361. By enacting Section 1361, Congress expressed its support for the decentralization of mandamus jurisdiction and improved access to federal

court for citizens affected by potentially illegal federal administrative actions. *See Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and Non-Statutory Judicial Review of Federal Administrative Actions*, 81 Harv. L. Rev. 308, 310-318 (1967) (hereinafter cited as "Byse"). It is noteworthy that during the deliberation on the drafts of proposed § 1361, the Justice Department had attempted to obtain rewording which would limit the scope of § 1361 by adding language witch would dredge up the ministerial-discretionary dichotomy. *Byse, supra*, at 316.[20] Generally these attempts were rejected and Congress enacted Section 1361 with the intent that as long as a citizen had standing to sue, that citizen could seek relief under § 1361 against federal administrators who owed a duty to that citizen and were acting illegally. *Byse, supra*, at 353-355. There is no hint of any congressional approval of or acquiescence to the Secretary's position that § 1361 was to be abrogated by § 205. While it is true that in the legislative history of § 1361 there is no specific mention of § 205 of the Social Security Act, none is required because, as one of the drafters of § 1361 states:

> the purpose of section 1361 is to authorize federal courts to review and compel official action on an

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[20] *See, Byse supra* at 316. Consistent with this stated intent was Congress' desire to avoid using the term "mandamus" to the extent that it would give federal courts the impression that Congress had countenanced the troublesome, and useless, dichotomy between ministerial and discretionary duties. It is clear that Congress feared such language ("in the nature of mandamus") would resurrect this dichotomy and needlessly obfuscate the progress intended by enacting a new § 1361. *See Byse, supra*, at 315-316.

> equality with the federal district court in the District of Columbia. . .

and, therefore,

> . . . the section should be interpreted as authorizing mandatory injunctive relief in original action . . . developing the equity, rather than the mandamus tradition.

Byse, supra, at 318, 331.

Moreover, since Congress knew that prior to 1962 the federal judiciary had limited its common law mandamus jurisdiction to the federal district court in the District of Columbia and since Congress specifically intended to expand that jurisdiction to all district courts, Congress acknowledged that the pre-1962 decisional law of the District of Columbia would be highly relevant to future determinations regarding the scope of § 1361. Thus it is important that prior to 1962 the District of Columbia did not accept many of the traditional constraints on mandamus jurisdiction such as the thorny "ministerial-discretionary" distinction which is urged by the Secretary. *See Byse* at 318.[21] Undoubtedly, Congress' intent in enacting

[21] On this very point, Professor Byse has said that:

> The initial resort of a federal judge reviewing official action under section 1361, therefore, should be to the body of precedent built up in the District Court and the United States Court of Appeals for the District of Columbia. Looking to those opinions, he will find that those courts are in many cases categorizing actions that request affirmative relief not as "mandamus" cases but as "reinstatement" cases, "land patent" cases and so on, classifications that focus on the substantive issues involved rather than the writ. Most importantly these District of Columbia courts have for the most part avoided reliance on the much criticized ministerial-discretionary distinction. Since section 1361 was proposed and enacted against the background of mandamus relief as it existed in the District of Colubmia in the year 1962, it would be most unfortunate if federal courts were to regard the words "in the nature of mandamus" as an invitation to revive the artificialities of common law mandamus. *Byse, supra*, at 318.

§ 1361 was to empower the federal courts to exercise supervision over federal officials' compliance with duties owed to the citizenry. It is clear that these reviewable duties would not include review of the individual's claim for eligibility for a government program (such as a recipient's intitial eligibility for social security disability benefits or his/her entitlement for waiver of an overpayment)—Congress had already provided for review of those individual claims by enacting statutes like § 205(g). However, it is equally clear that the duty of the Secretary to afford program beneficiaries their constitutional and statutory procedural rights *is* included in such review.

In his brief, the Secretary wrongly contends that this case is governed by this Court's finding in *Salfi* that because Congress intended § 205(h) to preclude § 1331 jurisdiction there, § 1361 jurisdiction is barred here. This contention ignores that: (1) *Salfi* dealt only with limitations on review of individual claims for benefits under Title II and *not* procedural due process cases such as the case at bar; (2) unlike the legislative history of and subsequent development of § 1331, when Congress has sought to limit § 1361 jurisdiction, it has specifically done so. *See* 38 U.S.C. § 211(a) (1970) amending 38 U.S.C. § 211(a) (1958), 2 U.S. Code Cong. & Admin. News, at 3729-31 (1970).

It is evident that the court of appeals decision is consistent with the body of decisional law developed by the federal appellate courts, with the rulings of this Court in *Salfi* and *Eldridge*, and with the legislative history of § 1361. For these reasons, the court of appeals properly determined that 28 U.S.C. § 1361 provided a basis for subject matter jurisdiction in this case.

4. The District Court's Class Certification Was Proper Under § 1361

Even though the district courts had jurisdiction under § 1361, the Secretary contends that the Buffington court improperly certified the class as follows:

> 1. Withe the exceptions set forth in paragraph 2 below, plaintiffs are appropriate representatives of a class composed of all individuals eligible for Social Security benefits pursuant to 42 U.S.C. § 402 whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing.
>
> 2. The class of which plaintiffs are appropriate representatives does not include:
>
> a. Residents of Hawaii; and
>
> b. Residents of the Eastern District of Pennsylvania; and
>
> c. All other individuals who are plaintiffs or members of a plaintiff class in an action against the instant defendant challenging his practice of reducing or otherwise adjusting Social Security benefits without prior notice and opportunity for a hearing, if a decision on the merits in any such action was entered on or before October 18, 1974.

Appendix to the Secretary's Brief, at 259-60. The Secretary claims that such nationwide certification is without congressional authority and that it forecloses the opportunity for "debate" among the courts of appeal and may force this Court to review a case prematurely. Op. Br. at 75. This position is absurd for it ignores the clear provision of Rule 23(b)(2) of the Federal Rules of Civil Procedure and it seeks to restrict unduly a district judge's discretion to define and certify class actions. Moreover, the Secretary's position disregards the "debate" which occurred in the case at bar resulting in three federal courts (the *Buffington*, *Elliott*, and *Mattern* cases[22]) independently examining the Secretary's recoupment procedures and finding them illegal. Also the Secretary's position is not even consistent with his claim in his brief that a nationwide class is unnecessary because he will abide by the non-class decision of a court. *Compare* pp. 68-69 *with* 75 of Op. Br. His expressed willingness to abide by a non-class decision will preclude debate among the circuits and there would be no need for additional suits. However, despite the Secretary's claims that he would follow a definitive non-class ruling, his conduct has not shown such willingness. For example, subsequent to the authoritative ruling of the Second Circuit in *White* v. *Califano, supra*, and this Court's denial of the Secretary's request for review, the Secretary has *not* abided by the *White* decision.

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[22] *Mattern* v. *Califano*, 582 F.2d 248 (3d Cir. 1978) petition for cert. pending *sub nom.*, *Califano* v. *Mattern*, No. 78-699.

Consequently, there have been numerous suits, throughout the country, filed to obtain compliance in those circuits with *White*. *See e.g., Blankenship* v. *Secretary of HEW*, No. 76-2342 (6th Cir., Nov. 24, 1978); *Wright* v. *Califano,* Nos. 78-1174 and 78-1175 (7th Cir., Nov. 16, 1978); *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978).

Furthermore, there is little doubt that the Buffington class is a classic (b)(2) action precisely because the Secretary has acted on grounds generally applicable to the whole class making final injunctive and declaratory relief as to the whole class appropriate. Rule23(b)(2). Certainly, if Buffington were not certified as it was, the predictable result would be numerous additional suits across the nation based on the identical constitutional and statutory claims at issue in *Buffington*. *See Elliott*, 564 F.2d at 1229-1230. It is precisely this evil that is avoided by national class certification. *See, e.g., Bermudez* v. *United States Department of Agriculture*, 490 F.2d 718, *cert. denied*, 414 U.S. 1104 (1973) in which the court of appeals noted that three district courts had invalidated national policies of the Department of Agriculture, but none had certified a national class. The result of barring district courts from certifying a national class is almost certainly "waste[ful]" litigation. *Metropolitan Area Housing Alliance* v. *U.S. Department of HUD*, 69 F.R.D. 633, 639, n. 11 (N.D. Ill. 1976). Such a result would serve neither the parties nor the courts. Moreover, there is no support for the Secretary's position in the legislative history of § 205(g); understandably Congress did not intend to limit the discretion of a district judge's management of a case once he had subject matter jurisdiction. Thus, the Secretary's position regarding the *Buffington* class certification is without merit and should be rejected.

B. The District Courts Also Had Jurisdiction Under § 205(g) To Grant The Injunctive Relief Sought By The Class Members

1. *Class Actions Are Available Under § 205(g)*

If this Court determines that 28 U.S.C. § 1361 does not provide subject matter jurisdiction in this case then respondents argue that the district courts properly exercise jurisdiction under § 205(g) to grant full relief to respondents and this class. That section provides in pertinent part that:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of this answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript

> of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.

Since the Secretary concedes that there is § 205(g) jurisdiction over the claims of the named respondents in this case, the sole issue is whether the district courts, consistent with § 205(g), could grant injunctive relief to the absent members of the class.

While the Secretary concedes that § 205(g) jurisdiction exists for the named respondents (Op. Br. at 52), he argues that class-wide relief is not authorized by § 205(g) (Op. Br. at 62-68). The Secretary also claims that the classes certified below are overly broad because they include beneficiaries who had recieved overpayments as of the date of class certification but who had not requested waiver. (Op. Br. at 65.) This argument misreads this Court's decision in *Salfi*, and ignores the federal appellate decisional law interpreting *Salfi*.

In *Salfi* v. *Weinberger, supra*, this Court ruled that § 205(g) was the proper, and sole, jurisdictional basis over claims for benefits under the Social Security Act. It also held that § 205(g) jurisdiction is not available until a person has sufficiently exhausted available administrative remedies. Subsequently, in *Mathews* v. *Eldridge, supra*, this Court explained that § 205(g) jurisdiction does in itself have two elements: the first, which cannot be waived, is that a social security recipient must file a claim of entitlement to benefits with the Secretary, and the second, which can be waived, is that all other administrative remedies be exhausted prior to filing suit. 424 U.S. at 329.

Contrary to the Secretary's contention that the class in this case is barred by *Salfi* and *Eldridge*, for purposes of class certification this case is significantly different from *both Salfi* and *Eldridge* in three important aspects. First, this case does not involve a claim to entitlement or continued entitlement to benefits. *All* the class members have successfully submitted claims for entitlement. If they had not, they would not now be subject to the Secretary's overpayment recoupment efforts. Moreover, their continued entitlement to benefits is *not* at issue in an overpayment proceeding, a proceeding entirely collateral to establishing claims for entitlement. As the court of appeals determined below:

> The instant suits are quite different [from *Salfi*]. They assert a constitutional right to due process notice and hearing when alleged overpayments are recouped. They are not claims for benefits. Nor would granting the relief sought result in an entitlement to benefits. The distinction between due process questions divorced from a claim for benefits and questions related to the merits of a benefits claim is a significant one, requiring considerably different treatment by the courts.

Elliott, 564 F.2d at 1226, 17.10.

Second, both the named and unnamed plaintiffs have already submitted claims for entitlement to benefits. To require the class members to submit additional claims seeking to avoid recoupment, as urged by the Secretary, would be to require entirely super-

fluous acts.[23] The underlying purpose served by requiring the filing of a claim for entitlement is to allow "the Secretary the opportunity, prior to consititutional litigation, to ascertain . . . that the particular claims involved are neither invalid for other reasons nor allowable under the other provisions of the Social Security Act". *Salifi* at 762. There are no "other reasons" or "other provisions" available to the Secretary in the overpayment recoupment process, where the *only* possible issues are whether an overpayment occurred, the amount of such overpayment, and the recipient's eligibility for waiver. *See Blankenship* v. *Secretary of HEW*, No. 76-2342, 6th Cir. Nov. 24, 1978) slip op. 2-4; *Wright* v. *Califano*, Nos. 78-0074 and 78-1178 (7th Cir. Nov. 16, 1978) slip op. 5-8; *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978); *Johnson* v. *Mathews*, 539 F.2d 1111, 1117 (8th Cir. 1976); *Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333 (3d Cir. 1977); *Tatum* v. *Mathews*, 541 F.2d 161 (6th Cir. 1976); *DeLao* v. *Califano*, 560 F.2d 1384 (9th Cir.

[23] *In Liberty Alliance of the Blind* v. *Califano*, 568 F.2d. 333 (3d Cir. 1977), the court of appeals certified a class pursuant to § 205(g). The court noted that while the Secretary had not passed on the claims of all the class members, he had "taken a final position in one of them . . . at the highest administrative level, on a legal issue common to all the class members." *Liberty Alliance, supra*, at 344. The court noted, at 343, that the Secretary's position would preclude the court from affording the class members the relief granted the named plaintiffs, even though they presented precisely the same legal issues. The court also observed that "requiring multiple exhaustion on the same issue would involve the same commitment of administrative resources unsupported by an administrative or judicial interest that Justice Rehnquist so aptly condemned in *Salfi*". (*Id.* at 345). Respondents submit the same considerations apply with equal force to the present case.

1979). *See also Norton* v. *Mathews*, 427 U.S. 524, 533-538 (1976) (Stevens, Marshall, Brennan, J.J. dissenting). (The Court did not reach the class certification issue, but dissent noted class actions under § 205(g) are proper.)

Third, unlike *Eldridge*, the class members here did not receive adequate notice about the nature and availability of the reconsideration and waiver procedure. *Elliott*, at 1223, n. 4, and 1236, n. 22 & 23. Under these circumstances, it would be fundamentally unfair to rule that § 205(g) jurisdiction does not exist for those recipients who failed to exhaust their administrative remedies, since the failure to exhaust was often due to the inadequacy of the Secretary's notice procedure.

Similar class certification questions under § 205(g) were before the Seventh Circuit in *Jimenez* v. *Weinberger*, 523 F.2d 689, 695 n. 10 (7th Cir. 1975), *cert. den.* 427 U.S. 912 (1976), and respondents submit that the *Jimenez* analysis and decision applies with equal force to this case. In *Jimenez*, the court of appeals reviewed a decision of the district court certifying a class and awarding retroactive relief to the class to unnamed plaintiffs. Previously, the Supreme Court had upheld plaintiffs' constitutional challenge to a provision of the Social Security Act which made certain illegitimate children born after the onset of the disability of their parent ineligible for benefits. The district court had defined the class as "all those denied benefits since the date of this action *solely by reason of that portion of the Act declared unconstitutional.*" *Jimenez, supra*, at 695 n. 10. (Emphasis in the original.)

The court of appeals rejected the Secretary's argument that *Salfi* required a reversal of the class certification. In so doing, the court first noted that since the class included only those who had been denied because of the challenged section of the Act, it excluded those "whose applications could have been or were rejected for other reasons as well." *Id.*

The court then concluded

> Thus, the class whose claims were properly before the district court was made up of applicants whose applications had progressed to a high enough level in the administrative proceedings where it could be, and was, determined "that the claim(s) were neither otherwise invalid nor cognizable under a different section of the Act." 95 S.Ct. at 2467. If the class is defined in this way, the exhaustion concerns embodied in § 205(g) and discussed in *Salfi* are satisfied.

Ibid. Accord: Blankenship v. *Secretary of HEW, supra: Caswell* v. *Califano supra.* Here, as in *Jimenez,* respondents' class is defined as consisting of all those who have been denied *solely* because of the challenged practice of the Secretary. Additionally, the present case is different from *Jimenez* in one significant respect. As respondents demonstrated previously, since respondents' procedural claims are entirely collateral to their substantive claims for entitlement to benefits, there is no possibility that any of the unnamed class members "could have been or were rejected for other reasons as well." *Jimenez, supra,* 695, n. 10. These recipients have claims which require no further agency action for their resolution and, consequently, this court should properly waive the § 205(g) exhaustion

requirement for the unnamed class members. Accordingly, this class was proper under § 205(g) and the class should include all those who were subject to the Secretary's overpayment recoupment practics.[24]

2. Injunctive Relief Is Appropriate Under § 205(g)

The Secretary also argues that § 205(g) precludes the grant of injunctive relief to individuals as well as to classes. The same argument was raised but not ruled on in *Norton* v. *Mathews,* 427 U.S. 524, 96 S.Ct. 2771 (1976). The court of appeals in *Elliott* did not rule on this issue. *Elliott,* 564 F.2d at 1225-1226, n. 8A. However, five appellate courts have rejected the Secretary's arugment. *Blankenship* v. *Secretary of HEW, supra; Caswell* v. *Califano, supra; Jimenez* v. *Weinberger, supra,* 694-695; *Johnson* v. *Mathews, supra,* at 1125; and *In Re Letourneau,* 559 F.2d 892 (2d Cir. 1977).

Under the Secretary's argument, it would be impossible for a social security recipient in a case not challenging his/her individual claim for benefits to obtain appropriate injunctive relief regarding the legality of the procedures to which he is, or may be, subjected. Taken together with his position that class actions are barred by § 205(g) and that § 1361 juris-

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[24] The Secretary also contends that the *Buffington* class definition in this case is improper because it includes recipients who "will be reduced or otherwise adjusted without prior notice and the opportunity for a hearing." Op. Br. at 65. This is a spurious argument. While the actual language used by Judge Sharp may appear to be too broad, that class definition is entirely proper because for all practical purposes the class covers those recipients who have, orally or in writing, sought to assert their statutory right to waiver.

diction is unavailable to adjudicate federal constitutional claims, the Secretary is asking this Court to sanction a system in which it would be utterly impossible for a social security recipient to raise a procedual issue. According to the Secretary, district courts are limited to awarding money benefits in individual cases. Such limited relief would be entirely useless for respondents who are *not* seeking review of their individual waiver determination but, rather are seeking an adjudication of their *procedural* rights. Moreover, the Secretary is taking wholly inconsistent positions before this Court regarding the availability of federal court review to respondents and their class. On the one hand he claims that § 1361 jurisdiction is unavailable because § 205(g) provides a full and complete remedy for respondents' suits. On the other hand, he insists that under § 205(g), no injunctive or class relief is available; he claims that a district court is limited to providing individual relief in individual cases. The Secretary's arguments are absolutely inconsistent and untenable.

Furthermore, the Secretary's arguments conflict with a plain reading of § 205(g) of the Social Security Act and with this Court's dispostion of *Jimenez* v. *Weinberger*, 427 U.S. 628 (1975). In *Jimenez*, because plaintiffs had challenged a federal statute on the grounds of its constitutionality, a three judge district court was empaneled under 28 U.S.C. § 2282. After an adverse ruling, plaintiffs appealed directly to the Supreme Court pursuant to 28 U.S.C. § 1253[25] *Jime-*

[25] § 1253 (Direct appeals from decisions of three judge courts) provides that:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

nez v. *Richardson*, 353 F. Supp. 1356 (N.D. Ill. 1973). At issue in *Jimenez* was the constitutionality of 42 U.S.C. § 416(h)(3)(b) which barred certain illegitimate children from receiving social security benefits based on the earnings record of the disabled father. By accepting jurisdiction in *Jimenez*, this Court "implicitly decided" that the three judge court was properly convened, and also, that the district court had the power to grant injunctive relief in an action under § 205(g) of the Social Security Act. *Jimenez, supra* at 693. This conclusion is compelled by the fact that unless the district court had jurisdiction to enjoin enforcement of an Act of Congress, a three judge district court would not have been required under 28 U.S.C. § 2282 and this Court would not have had appellate jurisdiction under 28 U.S.C. § 1253.

Additionally, as the Seventh Circuit noted on remand in *Jimenez*:

> In his Supreme Court brief for the Government in this case the Solicitor General acknowledged that the Supreme Court's jurisdiction vested in § 1253; he did not question that jurisdiction.

523 F.2d at 693 n. 6.

Moreover, the Secretary's claim that § 205(g) bars the granting of injunctive relief this conclusion is entirely inconsistent with the wording of 205(g) which, on its face, provides subject matter jurisdiction over Title II cases for the district court to affirm, modify

or reverse the decision of the Secretary. Understandably, 205(g) does not specify in what manner the district court must affirm, modify or reverse the Secretary's decisions, and it is clear that, contrary to the suggestions of the Secretary, none should be read into it. Again, as with his position on class-wide relief, the Secretary would have this Court ignore other relevant provisions of the Federal Rules of Civil Procedure and Title 28 once 205(g) jurisdiction is invoked. This occurs because it is clear that Rule 65, for example, provides ample authority for the district use of its injunctive power where 205(g) confers jurisdiction over the subject matter. Indeed, there can be no question that district courts under 28 U.S.C. §§ 2201, 2202[26] have specific congressional authorization to exercise broad equitable powers.

Hence, it is for these reasons the courts in *Caswell* and *Johnson* and *In Re Letourneau* properly decided that "no diminution in the remedial powers of the federal courts may be inferred. Congress must speak

[26] § 2201 states:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

and § 2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

clearly to interfere with the historic equitable powers of the courts it has created." (Citations omitted.) *In Re Letourneau, supra*, at 894, *Johnson, supra*, at 1125. These courts concluded that since § 205(g) did not contain any language which clearly indicated an intent to limit the district courts' traditional equitable powers, the courts would not infer such an intent.[27]

In his brief the Secretary correctly quotes from the scant legislative history of § 205(g) to the effect that Congress in 1939 added that section because

> . . . The present provisions of the Social Security Act do not specify what remedy, if any, is open to a claimant in the event his claim is denied by the Board.

S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939); H. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939). The legislative history seems to establish that § 205(g) was intended to *create* rather than limit remedies. It also strongly suggests that Congress did not draft § 205(g) with procedural issues like the one at bar in mind, but instead Congress was concerned about pro-

[27] Moreover, an injunction here is a *less* drastic remedy than limiting district courts to *reversing*, modifying or affirming the Secretary's decisions under § 205(g). If the district court affirms the merits of respondents' challenges, and the Secretary's decision can only be reversed or modified, then the Secretary is, in effect, requiring the court to reverse all recoupment claims as to the class members since 60 days before the filing of the complaint. These reversals, and the immediate retroactive benefits which would flow would be a far more intrusive remedy than an injunction ordering the Secretary to provide the opportunity for pre-recoupment oral waiver hearings.

viding judicial review to social security recipients for their individual, substantive claims for benefits.

From this legislative history, the Secretary erroneously contends that Congress intended to limit the form of the relief a federal district court could grant affirming, modifying, or reversing a decision of the Secretary. Clearly the Secretary has exaggerated Congress' intent and his argument assumes, without any additional legislative history, that Congress' enactment of § 205 foreclosed the district from exercising any of the traditional equitable powers these courts have employed for decades. Certainly, by enacting § 205(g) Congress never intended to restrict a district court's power so that the court under § 205(g) could not reverse a decision of the Secretary regarding a claim for benefits under Title II on the grounds that in reaching that decision the Secretary had employed illegal procedures.

The Secretary's claim that § 205(g) bars equitable and class action relief is an unwarranted interpretation of this legislative history, is an unduly narrow view of the scope of district courts' power in resolving constitutional controversies, and would work an intolerable injustice to social security recipients.

CONCLUSION

For the foregoing reasons, the judgment of this court of appeals should be affirmed.

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APPENDIX

APPENDIX A

§ 404.507 Fault.

"Fault" as used in "without fault" (see §§ 404.506 and 405.355) applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault (except for "deduction overpayments"—see § 404.510) on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under section 1814(e) of the Act, resulted from:

(a) An incorrect statement made by the individual which he knew or should have known to be incorrect, or

(b) Failure to furnish information which he knew or should have known to be material, or

(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.

[34 F.R. 14888, Sept. 27, 1969; 34 F.R. 15646. Oct. 9, 1969]

§ 404.508 Defeat the purpose of Title II.

(a) *General.* "Defeat the purpose of title II," for purposes of this subpart, means defeat the purposes of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under title XVIII), taxes, installment payments, etc.;

(2) Medical, hospitalization, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

(b) *When adjustment or recovery will defeat the purpose of title II.* Adjustment or recovery will defeat the purposes of title II in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses.

[32 F.R. 18026, Dec. 16, 1967, as amended at 34 F.R. 14888, Sept. 27, 1969]

§ 404.509 Against equity and good conscience; defined.

"Against equity and good conscience" means that adjustment or recovery of an incorrect payment (under title II or title XVIII) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1), (2), and (5)) or changed his position for worse (examples (3), and (4)). In reaching such a determination, the individual's financial circumstances are irrelevant.

[27 F.R. 1162, Feb. 8, 1962, as amended at 28 F.R. 14492, Dec. 31, 1963; 32 F.R. 18026, Dec. 16, 1967]

§ 404.510 When an individual is "without fault" in a deduction-overpayment.

Except as provided in § 404.511, or elsewhere in this Subpart F, an individual will be considered "without fault" in accepting a payment which is incorrect because he failed to report an event specified in section 203 (b) and (c) of the Act, or an event specified in section 203(d) of the Act as in effect for monthly benefits for months after December 1960, or because a deduction is required under section 203(b), (c), (d), or section 222(b) of the Act, or payments were not withheld as required by section 202(t) or section 228 of the Act, if it is shown that such failure to report or acceptance of the overpayment was due to one of the following circumstances;

(a) Reasonable belief that only his net cash earnings ("take-home" pay) are included in determining the annual earnings limitation or the monthly earnings limitation under section 203(f) of the Act.

(b) Reliance upon erroneous information from an official source within the Social Security Administration (or other governmental agency which the individual had reasonable cause to believe was connected with the administration of benefits under title II of the Act) with respect to the interpretation of a pertinent provision of the Social Security Act of regulations pertaining thereto. For example, this circumstance could occur where the individual is misinformed by such source as to the interpretation of a provision in the Act or regulations relating to deductions, or relating to the effect of residence of an alien outside the United States for more than 6 months.

(c) The beneficiary's death caused the earnings limit applicable to his earnings for purposes of deduction and the charging of excess earnings to be reduced below $1,680 for a taxable year ending after 1967.

(d) [Revoked]

(e) Reasonable belief that in determining, for deduction purposes, his earnings from employment and/or net earnings from self-employment in the taxable year in which he became entitled to benefits earnings in such year prior to such entitlement would be excluded. However, this provision does not apply if his earnings in the taxable year, beginning with the first month of entitlement, exceeded the earnings limitation amount for such year.

(f) Unawareness that his earnings were in excess of the earnings limitation applicable to the imposition of deductions and the charging of excess earnings or

that he should have reported such excess where these earnings were greater than anticipated because of:

(1) Retroative increases in pay, including back-pay awards;

(2) Work at a higher pay rate than realized;

(3) Failure of the employer of an individual unable to keep accurate records to restrict the amount of earnings or the number of hours worked in accordance with a previous agreement with such individual:

(4) The occurrence of five Saturdays (or other work days, e.g., five Mondays) in a month and the earnings for the services on the fifth Saturday or other work day caused the deductions.

(g) The continued issuance of benefit checks to him after he sent notice to the Administration of the event which caused or should have caused the deductions provided that such continued issuance of checks led him to believe in good faith that he was entitled to checks subsequently received.

(h) Lack of knowledge that bonuses, vacation pay, or similar payments, constitute earnings for purposes of the annual earnings limitation.

(i) [Reserved]

(j) Reasonable belief that earnings in excess of the earnings limitation amount for the taxable year would subject him to deductions only for months beginning with the first month in which his earnings exceeded the earnings limitation amount. However, this provision is applicable only if he reported timely to the Administration during the taxable year when his

earnings reached the applicable limitation amount for such year.

(k) Lack of knowledge by a wife, husband, or child entitled to wife's, husband's, or child's insurance benefits, as the case may be, that the individual entitled to old-age insurance benefits on the same earnings record has incurred or would incur deductions because of a violation of the annual earnings or 7-day foreign work test, whichever is applicable, provided the wife, husband, or child is not living with such old-age insurance beneficiary and did not know and had no reason to know that such beneficiary's earnings activity or the income derived therefrom has caused or would cause such deductions.

(l) Reasonable belief, with respect to earning activity for months after December 1954, that earnings from employment and/or net earnings from self-employment after the attainment of age 72 in the taxable year in which he attained age 72 would not cause deductions with respect to benefits payable for months in that taxable year prior to the attainment of age 72.

(m) Reasonable belief by an individual entitled to child's, wife's, husband's widow's, widower's, mother's, or parent's insurance benefits that earnings from employment and/or net earnings from self-employment after the termination of entitlement (other than termination by reason of entitlement to an old-age insurance benefit) in the taxable year in which the termination event occurred would not cause deductions with respect to benefits payable for months in that taxable year prior to the month in which the termination event occurred.

(n) Failure to understand the deduction provisions of the Act or the occurrence of unusual or unavoidable circumstances the nature of which clearly shows that the individual was unaware of a violation of such deduction provisions. However, these provisions do not apply unless he made a bona fide attempt to restrict his annual earnings or otherwise comply with the deduction provisions of the Act.

[27 F.R. 1162, Feb. 8, 1962, as amended at 28 F.R. 14492, Dec. 31, 1963; 34 F.R. 14888, Sept. 27, 1969; 36 F.R. 23361, Dec. 9. 1971]

§ 404.510a When an individual is "without fault" in an entitlement overpayment.

A benefit payment under title II or title XVIII of the Act to or on behalf of an individual who fails to meet one or more requirements for entitlement to such payment or a benefit payment exceeding the amount to which he is entitled., constitutes an entitlement overpayment. Where an individual or other person on behalf of an individual accepts such overpayment because of reliance on erroneous information from an official source within the Social Security Administration (or other governmental agency which the individual had reasonable cause to believe was connected with the administration of benefits under title II or title XVIII of the Act) with respect to the interpretation of a pertinent provision of the Social Security Act or regulations pertaining thereto, or where an individual or other person on behalf of an individual is overpaid as a result of the adjustment upward (under the family maximum provision in section 203 of the Act) of the benefits of such individual at the time of the proper termination of one or more beneficiaries

on the same social security record and the subsequent reduction of the benefits of such individual causes by the reentitlement of the terminated beneficiary(ies) pursuant to a change in a provision of the law, such individual, in accepting such overpayment, will be deemed to be "without fault." For purposes of this section "governmental agency" included intermediaries and carriers under contract pursuant to sections 1816 and 1842 of the Act.

§ 404.511 When an individual is at "fault" in a deduction-overpayment.

(a) *Degree of care.* An individual will not be "without fault" if the Administration has evidence in its possession which shows either a lack of good faith or failure to exercise a high degree of care in determining whether circumstances which may cause deductions from his benefits should be brought to the attention of the Administration by an immediate report or by return of a benefit check. The high degree of care expected of an individual may vary with the complexity of the circumstances giving rise to the overpayment and the capacity of the particular payee to realize what he is being overpaid. Accordingly variances in the personal circumstances and situations of individual payees are to be considered in determining whether the necessary degree of care has been exercised by an individual to warrant a finding that he was without fault in accepting a "deduction overpayment."

(b) *Subsequent deduction-overpayments.* An individual will not be without fault where, after having been exonerated for a "deduction overpayment" and after having been advised of the correct interpretation

of the deduction provision, he incurs another "deduction overpayment" under the same circumstances as the first overpayment.

[16 F.R. 13054, Dec. 28, 1951]

PART III-WAIVER

Basic Requirements for Waiver

Act-Sec.204(b)
Regulations No. 4-Secs. 404.506-404.512

5540. Legal Authority for Waiver.

Sec. 204(b) of the Act provides that there shall be no adjustment or recovery of a Title II overpayment when:

(a) The person liable is without fault; *and*

(b) Adjustment or recovery would either:

(1) Defeat the purpose of Title II of the Act; *or*

(2) Be against equity and good conscience.

See §§ 5589 ff. for the policy and procedures for waiver of recovery or adjustment of an overpayment of health insurance benefits; see §§ 5597-5597.9 concerning Title XVI waiver determinations.

5541. Fault

Since the law requires a finding of without fault in all cases before waiver may be approved, this issue should be resolved first. Where "without fault" cannot be found, a finding as to whether adjustment or recovery would either defeat the purpose of Title II or be against equity and good conscience is usually not required. However, if waiver must be denied and partial adjustment considered, development of a person's financial cirumstances may still be required (§ 5515).

Similiarly, where it cannot be found that recovery or adjustment of an overpayment would either defeat the purpose of Title II or otherwise be inequitable a finding as to the "without fault" factor is usually not required unless a decision must be made as to the rate of partial adjustment (§ 5515).

However, if there is sufficient information already in file which would support a finding with respect to any prerequisite for waiver, such finding should be documented in writing.

The term fault, as used "without fault" applies only to the person who is liable for repayment. The fact that the overpayment may have been caused by our error will not relieve the person liable from establishing that he was without fault. The fault need not necessarily involve fraud.

Fault will usually be attributed to a person liable for repayment of an overpayment where the facts show the overpayment resulted from:

(a) An incorrect statement by the person that he knew or should have known was false; *or*

(b) Failure of the person to give information that he knew or should have known was material; *or*

(c) Acceptance by the person of a payment that he knew or should have known was incorrect.

5542. Defeat the Purpose of Title II.

The phrase, "defeat the purpose of Title II," in sec. 204(b) of the Act means that recovery from a person would be contrary to the purpose and intent of the Act if it would deprive that person of income that is

reasonably necessary for ordinary living expenses. To make a finding as to whether the person has income or resources sufficient for more than ordinary and necessary living expense or is dependent upon his benefits to meet his needs, see §§ 5550-5551.

5543. Against Equity and Good Conscience.

Recovery will be against equity and good conscience where the person, in reliance upon the benefits or on notice that such benefits would be paid, relinquished a valuable right or changed his position for the worse. See § 5553 for typical examples of inequitable situations.

For certain deduction overpayments for which without fault is established, recovery or adjustment will be deemed to be because of the circumstances of the overpayment. See § 5559 for a summary of these situations.

A finding of deemed against equity and good conscience will also apply for those entitlement overpayments in which the person relied on misinformation from an official source (i.e., an agent or agency of the Government). See § 5547 where title II overpayments are involved and § 5589.2(e) for title XVIII situations.

5544. Classification of Overpayments for Purpose of Waiver.

To facilitate the development and uniform application of guides for providing waiver relief, overpayments are classified in two types: entitlement overpayments are deduction overpayments.

(a) Entitlement Overpayment

An entitlement overpayment is one that results from payment when the claimant fails to meet some requirement for entitlement (e.g., no insured status existed or payment was made after entitlement had terminated) or if the payment exceeded that amount the beneficiary was entitled to receive (e.g., incorrect computation, duplicate payment).

(b) Deduction Overpayment

Payment for a month in which a deduction or nonpayment event applied is referred to as a deduction overpayment. Deduction overpayments include the payment of benefits subject to deduction under annual earnings test or the 7-day work test, a mother's benefit received while the mother did not have a child in her care, a DIB or CDB paid after refusal to accept rehabilitation services, or a benefit recieved by an alien beneficiary after he had been outside the U.S. 6 months and did not fall within any of the exceptions to the alien nonpayment provision.

Under the annual earnings test an overpayment cannot be established until after the end of the taxable year. Therefore, waiver of recovery of such an overpayment cannot, of course, be considered until after the close of the taxable year (see § 5547.6).

5545. Use of Form SSA-632 in Developing Waiver

(a) General

When a person who had been notified of an overpayment appeals the overpayment determination or protests the proposed adjustment or the request for

refund (§ 5503.5), the SSA-632 (Overpayment Recovery Questionnaire) should be completed to permit a waiver of recovery determination to be made. Generally, the person will be assisted by the DO in completing the SSA-632 to reflect the facts surrounding the overpayment and the person's present financial situation. If the form is sent to the person to complete, or if the form is completed by telephone and is sent to the person for his signature, be sure to line out questions that do not apply for the particular type of overpayment situation involved. (See (c) and (e) below.) Take care to assure that the answers represent the person's statements and not the conclusions of the interviewer.

In addition to its use in developing waiver, the SSA-632 may also be of use in determining the rate of partial adjustment (§ 5515), in developing for compromise settlement (§ 5537.4), and in reporting an overpayment claim to GAO (§ 5532.4).

It is not essential that an SSA-632 be completed. Equivalent information in some other writing is acceptable. However, completion of the SSA-632 in accordance with the rules below should assure full development and is thus more likely to result in a proper decision.

(b) Part I—Without Fault Statement

Have the person complete this part whenever the waiver determination will be made.

(1) *Item 1*—The answer should include a complete statement by the person about his understanding of the provisions of law involved in the overpayment and the basis for his understanding.

(With respect to a health insurance overpayment, only item 1 of Part I need be completed.)

(2) *Items 2 and 3*—An indication of good faith or of the exercise of a high degree of care in complying with the reporting requirements is necessary to find a person to be "without fault."

For example, a person who made an arrangement with his employer intending to limit his earnings so that he would not incur deductions under the annual retirement test, or a person who had no such arrangement but carefully controlled his earnings for the purpose, may have shown good faith or exercised the necessary degree of care to justify a finding of without fault. The answer to these questions, therefore, should establish whether the person incurred any overpayment despite a conscientious effort on his part to stay within the earnings limitation as he understood it or whether he just worked without any concern as to the limitation.

If a person alleges he was misinformed, he should state the name of the person who gave him the wrong information, the approximate date he received it, and whether he received it through a personal contact or by telephone.

(3) *Items 4 and 5*—Although subject to rebutal, assume that each person received an explanation of entitlement and eligibility and the reporting provisions. Usually, the first explanation of entitlement and eligibility and the reporting requirements was given when the application was filed. The purpose of these questions is, therefore, to find out whether the person was actually furnished the necessary explanation was given, and his recollection of what was

explained to him. In this regard, question him about his reaction to any check stuffers and other reminder notices that he may have recieved about reporting responsibiities.

Appropriate DO observations and comments on the person's "without fault" allegation may be set out under Remarks or on an RC.

(c) Part II—Representative Payment Made

This part should be completed only if all or part of the incorrect payments were received by a representative payee. If representative payment was involved, line out this section. The answers to items 6 and 7, together with the information in Part I, will indicate whether or not the representative payee is liable for repayment of the overpayment. If the representative payee is without fault and used the funds on behalf of the beneficiary, the representative payee has no liability for repayment; in such case, a waiver determination would not be required with respect to the representative payee, and defeat the purpose (i.e., Part IV) would be developed only with respect to the beneficiary since the beneficiary is solely liable for making repayment (See § 5511 for discussion of liability and waiver where there is a representative payee.)

(d) Part III—Possession of Overpayment

All questions in this part must be answered.

(1) *Item 8*—If the person has all or part of the overpayment in his possession when first notified of the overpayment, recovery will not defeat the purpose

of title II with respect to such amount in the person's possession (§ 5546). (Note that whether or not the money has been spent, waiver can be approved when the overpaid person is without fault and recovery or adjustment would be against equity and good conscience.)

If the answer to item 8 indicates that the person still has any of the incorrect payments in his possession, advise him to return them immediately. This will serve to eliminate or reduce the overpayment. In such case, the DO will diary the case for followup action in 10 days if the person does not comply. If a refund is not received when the followup action is taken, the DO will give the reason on an RC and forward it to the PSC along with any other pertinent material. (If the DO receives a refund before the expiration of the 10-day control period, a statement concerning the refund or evidence thereof should be included with any waiver development.)

Also, in some few cases, the overpaid moneys may have been used to purchase real or personal property which is still in the individual's possession. A finding of defeat the purpose is precluded to the extent that the overpayment has been turned into clearly identifiable assets unless they are within the exceptions described in § 5550.3.

(2) *Item 9*—In addition to uncovering any possible sham disposition of assets, the answer to item 9 should help explain what happened to any large incorrect check (e.g., accrued workmen's compensation benefits which resulted in a benefit overpayment). Often such funds have not been reflected as a liquid asset nor has their expenditure been explained. Record the explanation in item 14 (Remarks).

If it is determined that a transfer of property was merely an attempt to conceal assets to avoid repayment of the debt, disregard the transfer in evaluating the debtor's net worth.

(3) *Item 10*—Take into consideration an inheritance which is expected (within 6 months) in determining a person's assets; it may be material to a "defeat the purpose" finding and a determination as to whether recovery action should be terminated.

(e) Part IV—Refund Questionnaire

Where a person seeks waiver relief, Part IV should be completed unless the person liable for repayment of a title II, title XVIII, or Black Lung overpayment receives cash public assistance (including title XVI) payments. (Line out this part in this situation so the person does not complete it.) In such a case, recovery of the overpayment will "defeat the purpose" without any further development or completion of Part IV with respect to other income, expenses, or assets. Where cash public assistance payments are alleged, contact the appropriate public assistance office to verify the debtor's current eligibility status.

If the person questions the need for furnishing financial information, explain to him that although financial resources generally are not a consideration for paying benefits, they are, as provided in law and regulations, a factor in determining whether he may be relieved from repayment of the overpayment. In some cases the beneficiary may wish to refund the overpayment, or have recovery effectd by adjustment, rather than complete Part IV, the Refund Questionnaire. If so, obtain, if possible, a signed statement from him, or prepare an RC giving the facts.

The answers to items 11-14 should reflect the overpaid person's total income from all sources, including any income of the spouse and any other *dependent* relative living in the overpaid person's household. Similarly, show the total expenses of the household and the total assets of the overpaid person and the spouse and dependent relatives who are members of the household. (A relative who lives in the household but who pays room and board and provides for all of his other needs is not a dependent; do not consider his income, expenses, or assets. For an exception to counting the income of a spouse of the overpaid person, see § 5532.4(a)(3). Also, when a representative payee is not liable for repayment because he was without fault in causing the overpayment and used the incorrect payments for the beneficiary, obtain financial information only for the beneficiary. It is only where the representative payee and the beneficiary are both liable for repayment that financial information should be obtained for both of them.

Where self-employment income is involved, show one-twelfth of the anticipated earnings for the year.

If the answer to item 13 indicates that a debt being paid by monthly installments will be liquidated in the near future (e.g., within the next 6 months), consider the effect of this decrease in usual expenses in determining the debtor's financial circumstances for defeat the purpose, referral to GAO, etc.

The claimant's allegation about living expenses, income, and assets may ordinarily be accepted if it appears reasonable considering all the circumstances in the case. If, however, the information appears incorrect or impossible, corroborating evidence will be

needed (See § 5550.5.) Obtain and record in Remarks or on an RC an explanation of why the expenses in item 13 exceed the income in item 11 where the SSA-632 does not show the source and amount of any supplemental funds received to cover the difference.

5546. Waiver Consideration When Person Has All or Part of Overpayment in His Possession

If a person has all or part of the overpaid benefits in his possession, recovery will not defeat the purpose of title II. If a person still has all or part of the overpayment in his possession at the time he is notified of an overpayment, waiver cannot apply as to recovery of that amount except where without fault is established *and* recovery or adjustment would be against equity and good conscience.

Recovery will not defeat the purpose of title II to the extend that the person liable for repayment has in his possession any of the overpaid checks or proceeds identifiable as the overpaid benefits in liquid resources. In most cases, the funds will be in the form of cash on hand, bank deposits, or securities purchased with the proceeds. A bank account built up gradually from income in addition to social security benefits will not usually permit identification of an incorrect benefit and the funds will be construed as ordinary assets. (See § 5550.3.)

Also, only if no benefit was due for a month in whch there is a deposit can proceeds of an incorrect payment be considered identifiable and in the person's possession. If only a part of a monthly benefit is incorrect in the month the desposit is made, the incorrect payment cannot be considered in the person's possession.

Just as the proceeds will not usually be identifiable as the incorrect benefit, withdrawals from an account generally preclude identification of funds remaining in the account as the incorrect benefit. For example: assume that there is $500 in a savings account and $100 is identifiable as an incorrect payment; a $50 withdrawal would leave identifiable proceeds of only $50. And, if $120 were withdrawn, it would no longer be possible to identify any part of the funds in the account as the incorrect payment.

In some few cases, the overpaid moneys may have been used to purchase real or personal property which is still in the individual's possession. Defeat the purpose of title II is also precluded to the extent that the overpayment has been turned into clearly identifiable assets unless they are within the exceptions described in § 5550.3.

Once it is determined that a person liable for repayment had in his possession an incorrect check or the proceeds of the payment at the time he was notified of the overpayment, recovery of the overpayment to the extent of the incorrect benefits determined to be (or to have been) in his possession cannot be found to defeat the purpose of title II. That a person on being notified of the overpayment fails to make restitution of incorrect benefits in his possession and subsequently disposes of the incorrect benefit cannot change the finding that recovery does not defeat the purpose of title II regardless of the person's subsequent financial circumstances.

5546.2. Months for Which Waiver May Not Be Considered

In monthly benefit cases waiver may apply only to months for which payment was certified to Treasury.

Thus, waiver cannot apply to a benefit payment which was withheld to effect recovery of a prior overpayment. The benefit so withheld is a credit rather than a payment and thus, since no payment was made, no overpayment exists for the period of withholding.

In deduction overpayment cases waiver cannot apply under the following circumstances:

(a) Where deductions are charged to different months from those in which work suspensions were imposed and there is no resultant overpayment.

(b) Where there is an overpayment for the month in which a beneficiary, (subject to the annual earnings test) reported his earnings or for the month in which he was given a proper explanation of the retirement test.

(c) Where there are overpayments for months before the beneficiary contacted us and recieved a proper explanation, if the contact was before he negotiated checks.

Fault

5547. When a Person Is Without Fault in an Entitlement Overpayment.

In determining whether "without fault" exists in entitlement-overpayment cases, it will be necessary to establish whether the person was at fault in causing the overpayment under the criteria set forth in § 5541. The determination must be based on all the facts in the individual case.

A person will be "deemed" to be "without fault" in incurring an entitlement overpayment where such overpayment is the result of the individual's reliance upon erroneous information from an official source within the SSA (or other agency of the Government). (See § 5547.1 below).

The following subsections discuss typical entitlment-overpayment situations in which without fault may or may not be established.

(a) Incorrect Benefit Rates

Usually a person is without fault because he cannot be charged with knowledge of how benefit rates are computed. However, where the error, regardless of the cause, results in a payment or payments clearly out of line with what could have reasonably been expected without fault can be established only on clear and convincing evidence.

(b) Lack of Insured Status.

In general, a person does not know the requirements for an insured status and is without fault if an overpayment occurs. Of course, if an E/R is fraudulent, a finding of without fault cannot be made unless it is clear that the person was not involved in the fraud.

(c) Duplicate Payments

A typical situation is where a woman receives benefits on her own E/R, and later we find that she had been receiving widow's benefits. If she did not withhold any information when she filed her claim, without

fault may be established; possibly she may have believed she was entitled to benefits in both capacities.

(d) Child's Benefits Not Terminated at Age 18 or Age 22.

Where benefits are not terminated promptly, the payee may very well believe the child is entitled to a check for the month he reached age 18 or age 22. Of course, where there has been a lengthy delay in stopping payment, stronger evidence is required to show why the payee did not inquire about entitlement to the benefit payments.

(e) Family Relationship

Where the overpaid person withheld information, for example about prior marriages, she is at fault in accepting payments.

On the other hand, where the claimant gave us full information and we made a payment, she would have no reason to question the payment.

(f) Medical Recovery

Evidence must show that the beneficiary could not reasonably have been aware that he was no longer under a disability.

EXAMPLE 1: Mrs. Jean Davis began receiving DIB effective September 1975 while she was in a hospital. She made a report to the SSA when she left the hospital in October 1975. As a result of a subsequently scheduled continuing disability investigation, it was determined that Mrs. Davis was again able to engage in SGA in April 1976 and, therefore, her disability ceased in that month. On June 10 Mrs. Davis was notified that her diability had ceased in April 1976 and that her last benefit payment would be for the month of June 1976. The notice also included an explanation of the right to request a reconsideration. However, through an error no action was taken to stop payment of her checks for July and August 1976. Mrs. David accepted the checks for those months and negotiated them, notwithstanding the termination letter that she had received earlier.

Mrs. Davis claimed to be without fault in causing the 2 months' overpayment. She contended she should not have to make a refund, because the SSA made the mistake in sending her checks when payment was not due.

"Without fault" cannot be established in this particular situation. Receipt of the checks for July and August 1976 after the termination letter advising that June 1976 would be the last payment due should have prompted Mrs. Davis to inquire at a social security office about whether she was entitled to additional payments. By not doing so, Mrs. Davis did not use reasonable care to avoid the overpayment. The fact that it was an error that allowed the checks for July and August 1976 to be released does not relieve her from her obligation to make an inquiry when it appears an error has been made.

EXAMPLE 2: Under the same factual overpayment situation set out above, Mrs. Davis visited a DO when she received the termination notice on June 10. Since Mrs. Davis believed she was still disabled enough to continue to receive payments, the DO assisted her in filing a request for reconsideration. The

DO advised Mrs. Davis that the case would be reexamined. The DO representative did not tell her anything about whether payments might be continued. On June 20, 1976, she was directed to report for a physical examination in connection with her reconsideration request. Payment of her benefits continued during the period in which the new medical evidence was being evaluated. A report of the results of the examination was completed early in September and it affirmed the finding that Mrs. Davis' disability ceased in April 1976 and that June 1976 was the last month of her entitlement to benefits.

When Mrs. Davis was advised that she had been overpaid for July and August 1976, she protested against refunding the amount of the incorrect payments for those months. She said she would not have cashed the checks if she had any idea that she was not entitled to them. She said that she had gone to the DO and fully explained her condition as soon as she received the notice in June 1976 that her last payment would be for June 1976. Mr. Davis also said that after the DO visit, she had been called for a physical examination so that when the checks came for July and August 1976, she thought it had been decided that she was entitled to continue to receive disability payments. Under these circumstances, it would be reasonable to find that Mrs. Davis was without fault in causing the overpayment.

(g) Return to Work in Disability Cases

To establish without fault, the file must show that the beneficiary did not withhold any material information about his work. Often without fault is precluded because the beneficiary did not disclose that

he was working when he filed—this requires close examination of the file.

Where the beneficiary tells us he did report his return to work, the file must contain evidence to show that a report had been made or an explanation from the DO as to when the beneficiary contacted that office and what information was reported. Without fault generally cannot be established for months before the report of work activity is made.

After the beneficiary reports his return to work, he is ordinarily advised that he may get his checks for a certain period; e.g., the trial work period. If it is later determinated that he was overpaid for all or some months in this period, notwithstanding that a proper report was made, he may be found without fault with respect to any checks that he accepted for this period.

If a beneficiary inquires about whether his work will affect benefits and is told that it does not constitute SGA, and he continues to do substantially the same work under the same conditions and rate of pay, he may be found without fault with respect to any overpayment resulting from a later determination that the work did in fact constitute SGA (§ 5547.1).

EXAMPLE 3: Mr. Paul Mace filed an application for DIB on may 14, 1975, stating that he became disabled in February 1975. An award approved on August 13, 1975, entitled Mr. Mace to a DIB of $196.20 effective August 1975. (His benefit was increased to $208.80. effective June 1976) He received his first check on or about September 3, 1975.

On September 13, 1975, Mr. Mace visited the DO and signed a statement showing that he returned to

work on September 2, 1975. Based on this information, the DO advised Mr. Mace that he could keep his check and he would be eligible for a trial work period. Then on September 26, 1975, the reviewing office advised Mr. Mace that after he worked for 9 months a decision would be made as to whether he actually regained his ability to work and his local DO would contact him before the end of that period to obtain needed evidence.

The DO contacted Mr. Mace on April 8, 1976, concerning his work activity, and he stated again that he began working September 2, 1975. The work was determined to be SGA and a decision of cessation was prepared on June 20 with cessation effective with June (the month following the trial work period) and benefits to continue through August. A posting reviewed in BDP in July 1976 indicated much higher earnings for the September 1975 quarter than had previously been noted; subsequent development disclosed the fact that the beneficiary had actually returned to work on July 1, 1975, rather than September. The correct date Mr. Mace began working on a regular an continuing basis was within the waiting period; therefore, he was not entitled to DIB and was not entitled to the trial work period. This resulted in an overpayment of $2,170.80 for August 1975 through June 1976.

Mr. Mace was notified of the overpayment and requested to refund the amount of the overpayment. The notice also explained his right to request waiver of recovery of the overpayment and the right to appeal the overpayment decision. He protested repayment, alleging that he had been misinformed by the DO and by the letter indicating he could receive his

benefits during the trial work period. Mr. Mace cannot be found to be without fault in causing the overpayment. It resulted from the fact that he did not give the DO the correct information about when he started to work. The information Mr. Mace received was proper on the basis of the report he had made that he started to work on September 2, 1975.

5547.1. When a Person is Without Fault in an Overpayment Involving Misinformation From an Official Source

A person will be found to be without fault in causing any type of an entitlement overpayment if he relied on incorrect information about the entitlement provisions given to him by SSA. The same is true if the information came from another Government agency which he reasonably thought was connected with the administration of the program.

Also, a beneficiary may be without fault if he attempted to obtain information about some aspect of the program or the payment of benefits but was misled because of an incomplete or technical explanation. However, misunderstanding of correct information from an official source does not justify waiver under the "misinformation" concept which provides relief from repayment without development of "defeat the purpose" or "against equity and good conscience." Therefore it is necessary to determine as definitely as possible whether the beneficiary misconstrued proper information.

In general, the "misinformation" concept does not cover overpayment situations which basically result

from administrative and clerical errors (e.g., incorrect benefit amounts shown on the award certificate).

The beneficiary must give a full explanation for his reliance on incorrect information. The explanation should be in the beneficiary's own words as destinguished from a statement prepared by the DO. The explanation should include the information which was received, the time and place it was received , and identify, if possible, the person who gave the incorrect information.

To support a finding of without fault, the beneficiary's allegation of misinformation should, it possible, be verified by the person who gave the information. If supporting evidence cannot be obtained from the person who allegedly gave the incorrect information, the person in charge of the office should furnish a detailed report as to the likelihood of misinformation being given. Since DO records are no longer available, resolve any doubts about the allegation of misinformation in favor of finding that the beneficiary did receive misinformation from an official source.

If the overpaid person is found to be "without fault" under the misinformation concept, adjustment or recovery of the overpayment will be deemed to be against equity and good conscience. (See § 5543.) Following are examples of typical situations where this rule would apply:

EXAMPLE 1: Mr. Bill Culp, a disabled individual, timely reported his return to work in the 5-month waiting period. A DO trainee incorrectly advised Mr. Culp that he had the benefit of a 9-month trial work period. If reliance on this advice, he accepted benefits which were later determined to be incorrect.

EXAMPLE 2: Mr. Milton Huff filed an application for benefits and subsequently received a benefit check covering several retroactive months. In order to assure himself that he was entitled to this check, Mr. Huff contacted a DO. The DO representative mistakenly assured him that the amount was correct and advised him to cash the check. In reliance on this advice, Mr. Huff cashed the check and spent the proceeds for the purchase of medical equipment and supplies. It was later determined that he was not entitled to payment for all the retroactive months covered by the check and was consequently overpaid.

5547.2 When a Person Is Without Fault in a Deduction Overpayment

The same basic principles govern findings of without fault in deduction overpayments as in entitlement overpayments. However, over the years we have become aware of certain typical situations where the overpaid person is without fault, which have been approved by the Commissioner. Thus, in a deduction overpayment, the overpaid person may be assumed to be without fault if the facts fall into one of the prescribed situations listed in § 5559. This assumption, however, may be overcome by facts which show bad faith or failure to exercise a high degree of care.

As indicated in § 5541, only where the overpaid person is found to be without fault need the question of whether recovery or adjustment would defeat the purpose of title II or be against equity and good conscience be developed.

5547.4 When an Overpaid Person Is at Fault in Deduction or Termination Overpayments

(a) General

An overpaid person will not be found "without fault" if the evidence shows a lack of good faith or failure to exercise a high degree of care in determining whether an event that might cause deductions or terminations of entitlement should be reported.

(g) Degree of Care

A high degree of care is expected of a person. However, it may vary with the complexity of the circumstances giving rise to the overpayment and the capacity of the particular payee to realize that he is being overpaid. Accordingly, variances in the personal circumstances and situations of individual payees are to be considered in determining the high degree of care expected of them.

EXAMPLE: Mrs. Gloria Jones, a widow who had been in benefit status since 1971, remarried on June 30, 1976. Upon receipt of a check for June, Mrs. Jones asked the clerk at a check cashing service if the June benefit was due her. The clerk advised her to cash the check because she had remarried on the last day of the month. Since Mrs. Jones was apparently aware that she might not be entitled to the June check, she should have contacted an SSA employee before cashing the check. Under these circumstances, the beneficiary failed to exercise a high degree of care in determining whether her remarriage on the last day of June would affect her entitlement to a benefit check for that month and thus cannot be found to be without fault.

If, however, Mrs. Jones had telephoned the DO but because of a misunderstanding was advised to cash the check, she would have exercised the high degree of care expected of her and would be found to be without fault in accepting payment for June 1976.

(c) Lack of Good Faith

Lack of good faith is shown where; for example, after having been given a full explanation of the retirement test the beneficiary continues to work and incurs an overpayment, or after recovery or adjustment had once been waived and the overpaid person fully instructed as to his duties under the deduction provisions, he again incurs a deduction overpayment under the same circumstances.

5547.6 Beneficiary Protests Imposition of Work Suspensions Durng Current Taxable Year

Where benefits are being withheld to prevent an overpayment under the annual earnings test and the beneficiary protests the withholding, suggesting that waiver of recovery may apply to payments already received, the DO should develop to determine the amount that may be subject to waiver and to determine the question of fault.

Waiver may be considered only as to benefits received before:

(a) The beneficiary informed SSA (i.e., DO or reviewing office) of his misunderstanding of the retirement test; or

(b) He was given a proper explanation of the test, if this was at a later date.

Therefore, the DO should establish the amount of earnings received up to the earlier of these two dates and including the month in which the date occurred. Evidence of without fault should also be developed and submitted to the reviewing office, but evidence of the beneficiary's financial ability to repay should not be obtained at this time. Since a determination of overpayment cannot be made until after the close of the taxable year the question of "defeat the purpose of title II" cannot be determined until that time.

It is appears to the reviewing office that the evidence establishes "without fault" under one of the situations in § 5559, benefits will not be withheld unless current work suspensions are otherwise in order. If benefits have previously been withheld because of these earnings, they should be reinstated. The reviewing office will send the beneficiary a letter telling him that the SSA will determine whether to withhold benefits to recover the overpayment after he has submitted his annual report following the close of the taxable year. (Where applicable the letter will also advise him of the current withholding of benefits.) The reviewing office will diary the case for January 1 of the following year at which time it will request the DO to obtain an annual report of earnings and, where necessary, completion of Part IV of the Overpayment Recovery Questionnaire. Waiver will then be considered only as to the deduction overpayments resulting from the earnings in the taxable year up to the date on which the beneficiary informed the SSA of his misunderstanding of the retirement test or to the date he was given a proper explanation of the test, whichever is applicable.

In "against equity and good conscience" cases recovery or waiver action will also be delayed until receipt of the annual report.

5547.7 Waiver of Adjustment Against Beneficiary Other Than Overpaid Person

Where a beneficiary other than the overpaid person protests an adjustment of his benefits to recoup an overpayment, waiver of adjustment should be considered with respect to such beneficiary. However, "without fault" for waiver purposes applies separately to each person from whom recoupment may be sought. This includes other beneficiaries entitled on the same E/R as well as the overpaid person.

Waiver of adjustment against the particular benefits payable to a beneficiary other than the overpaid person does not, of course, wipe out any part of the debt. Recovery of the entire overpayment still outstanding should be effected by adjustment against the benefits of any other beneficiary who is liable, if waiver relief cannot be granted to such beneficiary.

Where the overpaid person is "without fault" in causing the overpayment, it will be presumed that any other beneficiary subject to adjustment is also "without fault" unless we are on notice that the other beneficiary caused or contributed to the overpayment. Where such a presumption of "without fault" is made, waiver may apply as to any other beneficiary, provided adjustment against him would defeat the purpose of title II or be against equity and good conscience.

Where the overpaid person is not "without fault" in causing the overpayment, waiver may still apply

for any other beneficiary subject to adjustment provided the other beneficiary was "without fault" (see § 5547.8) and adjustment against him would defeat the purpose of title II or be against equity and good conscience.

5547.8 When a Beneficiary Other Than the Overpaid Person Is "Without Fault"

In determing whether "without fault" exists on the part of a beneficiary other than the overpaid person, except when "without fault" is presumed (see § 5547.7 it will be necessary to establish whether such beneficiary was at fault in causing the overpayment. "Fault" will usually be attributed to such beneficiary where the facts show the overpayment resulted from:

(a) An incorrect statement by the beneficiary that he knew or should have known was false; or

(b) Failure of the beneficiary to give information that he knew or should have known was material.

When a deduction overpayment resulting from earnings under the annual earnings or 7-day foreign work test is involved, see § 5570.